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What is "Government by Injunction?" Does it Exist in the United States?

ANNUAL ADDRESS

BEFORE THE

GRAFTON AND COÖS BAR ASSOCIATION,

JANUARY 28, 1898.

BY

J. H. BENTON, JR.

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From J. H. BENTON, Jr.,

Ames Building, Boston.

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WHAT IS "GOVERNMENT BY INJUNCTION?" DOES IT EXIST IN THE UNITED STATES?

ANNUAL ADDRESS BY

J. H. BENTON, JR.

Mr. President and Brethren of the Bar:

We are living in a time of deep social unrest. A continually increasing number of people are dissatisfied with the existing order of things. The civilized world has been practically at peace for more than a generation while marvelous improvements in labor-saving machinery and in means of communication and transportation have caused a rapid and enormous increase in wealth which has necessarily been unequally distributed.

Combinations of capital for the successful conduct of great enterprises have been carried to a point which many thoughtful persons fear is likely to threaten the stability of the state. Social and economic laws which were supposed to be sound and immutable are now questioned and declared to be unadapted to existing conditions.

In the pulpit and on the platform there is a constant discussion, and the press teems with countless publications, stating new economic and political theories. From the farm and the market, the factory and the shop, there swells a note of discontent, which bodes no good to the Republic. Checked for the moment by a return of prosperity, which may be only temporary, the cause of complaints is claimed to be not removed. We are in a period not unlike the half

century which preceded the French Revolution, and which has always preceded radical revolution, marked not only for the number of reforms proposed, but still more for the universal talk about them.

This condition has come about gradually. From the close of the Civil War down to the present time there has been denunciation of our political institutions by an element in our population who seem to think that liberty consists in the absence of law. The political conduct of the people has become vacillating and unsettled. By an enormous majority they give power to one political party, and then, without apparent cause, turn about, and with an equal majority give it to the other. A large portion of the people seem to have no settled political convictions, but to be in a state of constant discontent.

From time to time this discontent takes definite forms of complaint and demand. One demand is that all combinations in business shall be suppressed; another that taxes shall be so levied that no great accumulation of wealth shall be possible; another, that private property in land shall be abolished; another, for national, state, or municipal ownership of all means of communication of intelligence and all means of transportation, and also of all means for the production and supply of water, gas, electric light, and other public conveniences.

Still another, and one which has, perhaps, been recently most definitely and widely made, is the complaint that the judiciary have usurped legislative and executive power, and by the use of their equity powers to restrain irreparable injury and punish violation of their orders by proceedings for contempt, have in reality assumed to make and enforce criminal law without trial by jury, and thus to create what is popularly termed "government by injunction."

It is claimed that persons are thus convicted of crimes without the judgment of their peers, and are punished, not under fixed laws with penalties established by the legisla-

ture, but at the arbitrary discretion of single judges. In 1896, this complaint was a principal plank in the platform of one of the two great political parties in the nation, and was supported by the votes of more than six million electors. The platform of the Democratic party, adopted July 9, 1896, declared that

> "We especially object to government by injunction as a new and highly dangerous form of oppression, by which federal judges in contempt of the laws of the states and rights of citizens, become at once legislators, judges, and executioners; and we approve the bill passed at the last session of the United States Senate and now pending in the House of Representatives relative to contempts in federal courts and providing for trials by jury in certain cases of contempt."

This complaint and demand for remedy by legislation has since been embodied in the platforms of the same party in many states, including the great order-loving commonwealths of Pennsylvania, Ohio, and Massachusetts. The platform of the Democratic party of Massachusetts, adopted September 28th, 1897, declared that

> "The right of trial by jury is our great inheritance and shall not by our consent be impaired; but to-day great corporations demand from courts of equity, blinded by the interests of capital, injunctions that forbid workingmen from enjoying the inalienable rights and privileges of free men. The arrest of men for acts not forbidden by law and their trial and conviction without trial by jury or right of appeal to higher tribunals constitute judicial oppression and violate the safeguards of the Constitution and of the Bill of Rights. Judges who usurp the powers of the legislature and of the executive unlawfully invade personal liberty, and forget that this is a government of laws and not of men."

A leading Massachusetts lawyer,[1] who is a prominent Republican member of the National House of Representatives, speaking in October last to a large meeting of the

[1] Hon. W. H. Moody.

most influential Republicans of that state, was applauded when he said:

> "I believe in recent years the courts of the United States, as well as the courts of our own Commonwealth, have gone to the very verge of danger in applying the process of the writ of injunction in disputes between labor and capital; and I do not propose to let the Democrats say that alone. But I want you to consider for a moment what already has been done. . . . You all around me, who will be members of the General Court of Massachusetts, will deal with that subject as you please. It is a mere legislative detail. We, in congress, must deal with it so far as it affects the courts of the United States."

He then proceeded to state with apparent approval the passage by the United States Senate of a bill in relation to contempts in the federal courts, providing that no person shall be punished for a contempt not committed in the presence of the court, or so near thereto as to obstruct it, without a trial by jury, and the right to appeal to the Supreme Court; and continued by saying:

> "This question of injunction will be dealt with in the Congress of the United States, and the question of injunction can be dealt with in the legislature of the Commonwealth of Massachusetts."

The matter has also provoked discussion by the profession. At the annual meeting of the American Bar Association, in August, 1894, an elaborate paper was read by Mr. Charles Claflin Allen of St. Louis, entitled, "Injunction and Organized Labor," in which the decisions up to that time were reviewed and the action of the federal courts sharply criticised.[1]

In the discussion upon this paper, a wide difference of opinion between the members of the Association was developed, but the importance of the question was recognized by all.

[1] Reports American Bar Association, Vol. 17, *p.* 299.

At the same meeting, that conservative jurist who has always stood strongly for the honor and power of the courts, Thomas M. Cooley, in his annual address as president, after a careful review of the lamentable labor disturbances of that year, said:

> "Courts with their injunctions, if they heed the fundamental law of the land, can no more hold men to involuntary servitude for even a single hour than can overseers with the whip." [1]

And as his closing admonition to the profession, asked that attention

> "be given to the question whether discretionary punishment of strikers as for contempt, when the acts punished were but trespasses upon the possession of a receiver, is not being pushed to an extreme that is a little startling." [2]

In June, 1895, Mr. F. J. Stimson, a thoughtful lawyer and accurate legal student, called attention to the subject by an article entitled, "The Modern Use of Injunctions," and declared that the federal courts had exceeded their equity powers and practically undertaken to punish riots and other criminal acts by process for contempt, based upon injunctions which ought not to have been issued.[3]

Mr. William H. Dunbar of the Boston Bar has recently written for a leading English legal periodical an able article on this subject, in which he says the action of the courts

> "presents a serious menace to the very framework of the government." [4]

Judges of high character have not hesitated to criticise the action of the federal courts, and to say that it should be checked either by legislation or, as one of them suggests, by the sure remedy

[1] Reports American Bar Association, Vol. 17, *pp.* 15–51.
[2] Reports American Bar Association, Vol. 17, *pp.* 240, 243.
[3] Political Science Quarterly, June, 1895, *p.* 1.
[4] The Law Quarterly Review, October, 1897, *p.* 347.

> "of a constitutional amendment which shall make the United States judges elective by the people in their respective districts and circuits for a term of years."[1]

Of thirty judges, lawyers, and prominent persons in the middle Western States, whose views were asked upon this subject in 1894, fifteen of the judges replied; only two of them defended the action of the federal courts, and one of those was a federal judge who had himself issued an injunction in a labor controversy; six were noncommittal, while seven criticised the action and suggested a remedy by legislation or constitutional amendment.

On the other hand, President Henry Wade Rogers of the Northwest University, declares that these injunctions do not violate the constitutional guarantee of trial by jury, but have only been issued in the exercise of the equity power to prevent irreparable injury to property, and that the interests of labor and capital alike demand that unlawful acts shall be prevented. And so prominent a person as the late United States Senator, J. M. Palmer of Illinois, and a recent candidate for President of the United States, has said that

> "Until some satisfactory substitute is found by congress or state legislatures for the control and protection of the rights of person and property, the country will be compelled to submit to a government by injunction. Speaking for myself, I prefer a government by injunction to anarchy, the rule of a mob, or that of a musket."[2]

Nor has this criticism been confined to the states where these injunctions have been issued. In October last, a leading Republican newspaper of New England approved the opposition to "the growing use of injunctions;"[3] and

[1] Murray F. Tuley, Chief Justice Illinois Court of Appeals; James McCabe, Chief Justice Supreme Court of Indiana; Jesse J. Phillips, Chief Justice Supreme Court of Illinois; Walter Clark, Justice Supreme Court, North Carolina; John Gibbons, Justice Circuit Court, Illinois.

[2] Chicago *Times-Herald*.

[3] Boston *Journal*, October 5, 1897.

the Boston *Herald*, in an editorial review of the question stated that

> "The criticism that can be made upon recent judicial action of the kind referred to is that in the opinion *of a large number of our people* it has gone beyond proper limitations, and, as a result, restraints have been imposed upon individual action which neither the national congress nor the legislatures of the various states would ever have imposed if the facts in the case had been brought to their attention."

"On the other hand," it adds,

> "It should be insisted upon that the cure for the evil is not to be found in throttling the power of the courts, which is the safeguard of individual liberty, but in so impressing upon the thought and conscience of the nation a true conception of equity that no judge will think of misusing, or will dare to misuse his power."[1]

A prominent religious paper of New York has discussed the question in several leading articles and criticised the conduct of the federal courts in language conservative, but severe, declaring that the great danger to be feared is that the people will lose confidence in the courts.[2]

It was the dominant purpose of the makers of our national and state constitutions to prevent the exercise of arbitrary power by any man or any set of men. To accomplish this, they so distributed the powers of government among the executive, legislative, and judicial departments of the government, that each branch should not only be independent of the others, but that each should be a check upon the exercise of arbitrary power by the others.

It was believed then that the judiciary, although necessarily having arbitrary power in some cases, was the weakest of the three branches, and, therefore, could not unduly exercise such power. But although the legislature holds the purse, the executive the sword, and the judiciary has

[1] Boston *Herald*, October 2, 1897.

[2] The *Independent*, August 26, 1897. "Government by Injunction," New York *Independent*.

neither money nor physical power, it has under our constitutions the power to decide absolutely upon the constitutional limitations not only of the power of the legislature and of the executive, but upon the constitutional limitations *of its own power.*

With no power to tax, and no power to coerce, it can, not only decide upon the constitutional extent of the power to tax and of the power to coerce, but upon the extent of its own power to decide. And it is claimed that the judges can thus, by the exercise of the equity power to issue injunctions and to punish the violation of them at their discretion by process for contempt, within constitutional limitations adjudged by themselves, *create rules of conduct, adjudicate as to the violation of such rules, and punish the violation at their discretion.*

It cannot be doubted, I think, that this power, although discretionary and therefore in a sense arbitrary, is essential to the proper exercise of the equity power of the courts. The judiciary have had this power, and have exercised it since the foundation of the government without criticism until within a few years. At the same time the federal judiciary has step by step assumed jurisdiction to an extent of which it is safe to say the founders of the Republic never even dreamed. But such has been the character of the judges and the confidence of the people in their integrity and wisdom, that the legislature, the executive, and the people have, with the rarest exceptions, until recently yielded an almost unquestioning obedience to their decisions.

For more than a hundred years, the judiciary, state and federal, has exercised its equity powers so wisely and judiciously as to secure and retain the absolute confidence of all our people. Why is it that within a few years its conduct in the exercise of these powers has been such as to provoke widespread dissatisfaction and criticism? Has it exercised its discretionary power to issue injunctions and to punish

for contempt in equity causes, contrary to the spirit of the constitution, and so as practically to deprive persons of the constitutional safeguard of jury trial?

This is a matter which concerns the exercise of judicial power, and in which the Bar ought to have accurate knowledge, a wise opinion, and a controlling voice. The people have a right to expect the profession to act in such a matter. It is our duty to see to it, so far as we can, that the administration of justice is conducted in a proper manner and within the limits of constitutional power. A profession from whose members the judges are taken, and by whose aid and counsel the judiciary exercise their powers, ought not to sit silent under the circumstances which exist in respect to this matter.

It is the duty of the Bar to know whether this complaint has just foundation, and if it has, to see to it that a wise and judicious remedy is applied. Certainly no locality can be more favorable for an impartial discussion of this question than a state where, so far as I am aware, no such ground of complaint has ever been alleged to exist.

It may be said that this is a question which respect for the courts forbids the Bar to discuss; that it is improper for us, as officers of the court, to examine into their conduct and criticise their action if found to be wrong. On the contrary, I believe we are the persons who should criticise the action of the courts, if it ought to be criticised, and defend it if it ought to be defended. And I am confident that the courts, so far from regarding this as improper, will welcome it as an aid to them in the discharge of their difficult duties.

What, then, are the facts? Is there, then, any real foundation for this widespread and persistent complaint? Have the judiciary usurped legislative or executive power, or so exercised judicial power, as to, in fact, exercise legislative or executive power? In short, what is "Government by Injunction?" and does it exist in the United States?

In the first place, as I have observed, this complaint is of very recent origin. The state and federal courts, in the administration of justice over our widely extended territory, exercised their equity powers of injunction and of punishment for contempt for violation of such injunctions more than a century before any complaint as to their action in this respect was made. It is within less than five years that this complaint of their conduct has arisen. This of itself would seem to challenge attention and provoke inquiry as to whether they have not assumed a new power or exercised an old power in an improper manner. To ascertain this, however, a review of the decisions upon which the complaint is based is necessary. Unfortunately these decisions have nearly all been made in disputes between organized or unorganized labor and employers, and have thus appeared to be directed against workingmen for the protection of the property of capitalists.

The first use of injunction to prevent unlawful conduct by organized labor was, I think, in *Spinning Company* v. *Riley*, L. R., 6 Equity 551, in 1868, where the officers of a trade union were enjoined from intimidation of workmen by the use of placards and advertisements directing them not to be employed by the Spinning Company. Upon demurrer, it was held that the acts of the defendants as alleged by the bill, although they amounted to crime, could be restrained, because they also tended to the destruction or the irreparable injury of the plaintiff's property. The vice-chancellor in this case stated the jurisdiction of a court of equity in this respect as follows:

> "The jurisdiction of this court is to protect property, and it will interfere by injunction to stay any proceedings, whether connected with crime or not, which go to the immediate or tend to the ultimate destruction of property, or make it less valuable or comfortable for use or occupation."

The decision of the case itself was overruled in 1874, on the ground that an equity court cannot enjoin a libel

(*Assurance Co.* v. *Knott*, 10 Ch. Ap. 142), but the rule as thus stated has been the precedent for subsequent decisions.

This rule, it will be observed, placed the jurisdiction of the court wholly upon private grounds; that is, the protection of *private property*, and not in the slightest degree upon the protection or preservation of public rights.

In 1888, the Supreme Court of Massachusetts, and in 1891, the United States Circuit Court in Ohio issued injunctions to restrain boycotts by solicitation, threats, parading with banners, and other devices calculated to intimidate workmen, and to injure employers for whom they desired to work.[1] Those cases were placed entirely upon the rule stated in *Spinning Company* v. *Riley*, and provoked no special comment outside the profession.

But in 1892, the courts, especially the federal courts, began to exercise the power to issue injunctions and punish violation of them to an extent which has caused the discussion and complaint to which I have alluded.

The following is a statement of the reported cases in the order of time so far as I have been able to gather them in the limited time at my command:

Cœur d'Alene Consolidated & Mining Company v. *Miners' Union* (Circuit Court, D. Idaho. July 11, 1892), 51 Fed. Rep. 260.

Here, upon bill by a foreign corporation against citizens of Idaho, alleging that the defendants had organized into several miners' unions, for the purpose of controlling and dictating the wages to be paid in the plaintiff's mines, and by means of threats, intimidation, and force to prevent all persons other than themselves from working in the mines, whereby the plaintiff had been compelled to cease to work its mines, and that the defendants were insolvent and unable to respond in damages, an injunction was issued by Beatty, D. J., restraining the defendants

[1] *Sherry* v. *Perkins*, 147 Mass. 212. *Casey* v. *Typographical Union*, 45 F. R., 135.

"from entering upon complainant's mines, or from interfering with the working thereof, or by the use of force, threats, or intimidation, or *by other means*,[1] from interfering with or preventing complainant's employés from working upon its mines."

This injunction was *ex-parte*, and upon motion to vacate it the Judge found that the

"defendants are organized into associations wherein submission to stringent and arbitrary rules is required; that by means approaching dictation, they have attempted to control employers in the selection of laborers and the wages to be paid them, and have discouraged, and, as far as they could, prevented, those who do not belong to their societies from procuring work; that, by force, in one instance, they took complainant's laborers from its mine to their hall, where, upon such laborers refusing to comply with their demands to join them, and abide by their laws, they actually ordered their banishment from the state, and in a manner deserving the most severe condemnation enforced their lawless decree, and against men, who, by reason of their birth, and not through the grace of the government, were entitled to all the rights of American citizenship; that in such numbers, and under such circumstances, as were menacing, they have requested non-union men to cease work, and to such have applied, in an offensive and threatening manner, most opprobrious epithets, and in other ways have annoyed and vexed laborers who refused to join their associations."

He also stated that the governor had, by proclamation, declared that it had come to his knowledge

"that there now exist in the county of Shoshone, state of Idaho, combinations of men confederating and conspiring for unlawful purposes, insomuch that the property of citizens of said county is jeopardized, and the people thereof terrorized, and the laws are set at naught; and . . . the civil authorities seem inadequate or are disinclined to suppress violence and redress wrongs; and . . . such combinations are preventing by force the owners of mines from working and developing the same, and from employing persons of their choice, and are interfering with railroad travel and traffic."

[1] The italics in this and subsequent quotations are mine.

This proclamation the court relied upon as a public document, and as a correct statement of the facts, saying:

> "A wrong exists; rights have been infringed; unoffending citizens have been maltreated; *the law has been overriden.* . . . The question is whether a court of chancery can exercise its power to restrain the further commission of the acts herein complained of. The unrestrained execution of the designs, which it would seem from the record in this case the defendants entertain, would result unfortunately. Carried to their logical conclusion, the owner of property would lose its control and management. It would be worked by such laborers, during such hours, at such wages, and under such regulations, as the laborers themselves might direct. Under such rule its possession would become onerous. Enterprises employing labor would cease, and, instead of activity and plenty, idleness and want would follow. . . . Unfortunately, combinations of labor are met by associations of employers, each trying to baffle what it deems the aggressions of the other. It is to be regretted these opposing forces have in late years gone so far in their efforts for supremacy that they now operate upon the principle that their interests are antagonistic. It is when these contests become so heated that *violations of the law, the peace of the community, and the destruction of life and property are threatened, that the courts are compelled to intervene.*"

The injunction was therefore continued pending the final disposition of the case.

Murdock, Kerr & Company v. *Walker et al.* (October 27, 1892), 152 Penn. 595.

The plaintiffs were job printers, and their journeymen and pressmen, being members of typographic and pressmen's unions, left their employment because their wages were not increased. The plaintiffs' bill alleged that the journeymen and pressmen who had thus left their employment had combined to prevent persons not members of said unions entering into the plaintiff's employment, and had attempted to accomplish this purpose by

> "threats, menaces, intimidation, and opprobrious epithets addressed to the plaintiffs' workmen, by gathering in crowds about plaintiffs' place of business and places where plaintiffs' workmen boarded, following the workmen to and from their work and holding them up to ridicule and contempt of bystanders," etc.,

and also alleged that by this conduct the plaintiffs had been deprived of the services of the men who were willing to work for them, and impeded and damaged in their business, and that the defendants would continue their unlawful conduct if not enjoined. The court found as a fact that

> "A number of the defendants, with others, have been in the habit of collecting in crowds about the establishment of the plaintiffs, having followed their workmen to and from their boarding-houses and possibly interfered with them in passing along the public streets, in some instances even resorting to actual force, and that the whole course of those actively engaged in this movement was a menace to the workmen of the plaintiffs *as well as to the public peace*,"

and an injunction was ordered, restraining the defendants by name

> "from gathering at and about plaintiffs' place of business, and from following the workmen employed by the plaintiffs, or who may hereafter be so employed, to and from their work, and gathering at and about the boarding places of said workmen, and from any and all manner of menaces, intimidation, opprobrious epithets, ridicule and annoyance to and against said workmen, and any of them, for and on account of their working for the plaintiffs."

On appeal this injunction order was affirmed by the Supreme Court, January 3, 1893.

Blindell et al. v. *Hagan et al.* (Circuit Court, E. D., Louisiana, February 9, 1893), 54 Fed. Rep. 40.

Here, upon a bill by ship-owners alleging that they were the owners of a steamship in use in the carrying trade between New Orleans and Liverpool, and that they were

> "prevented from shipping a crew by the unlawful and well-nigh violent combination of the defendants; that this combination was so numerous as to make it impossible for the complainants to obtain a crew without a restraining order of the court; that this unlawful interference of the defendants was interrupting the business of the complainants in the carrying trade, and doing them an irreparable injury,"

Billings, D. J., issued an injunction restraining the defendants from interfering with and preventing the shipowners from shipping a crew. The precise terms of the injunction do not appear in the report, but the character of the acts enjoined appears from the statement of the court that the evidence failed "to connect the defendant Dunn with the *unfriendly* acts of the other defendants," and, therefore, injunction should not issue against him.

In this case it was first claimed that such an injunction could issue under the Act of 1890 (26 U. S. Statutes at large, *p.* 209). But the court held that suits in equity, or injunction suits by any other than the Government of the United States, are not authorized by that act.

Toledo, Ann Arbor, etc., Railway Company v. *Pennsylvania Company*, et al. (Circuit Court, W. D. Ohio, March 25, 1893), 54 Fed. Rep. 746.

Here, the Toledo & Ann Arbor Railway brought a bill against the Pennsylvania Company and other companies, owning connecting railroads to compel them to receive from it and deliver to it interstate freight. A mandatory injunction was issued and served upon the defendant companies, and brought to the notice of the employés of the companies by publication.

Afterwards the plaintiff applied for an order attaching certain employés, engineers and firemen, for contempt in violating the injunction. When they were brought into court, *Ricks*, D. J., who had issued the injunction admonished them as to their duties, saying:

"The order of the court was made, in this case, after due consideration,[1] with full knowledge of its scope and possible consequences, and with the purpose to enforce it in its letter and spirit without unnecessary hardship, but with such promptness and vigor as might become necessary to give full protection to all concerned. . . . I desire now to suggest to you that you should not overlook the nature and importance of your employment. You are engaged *in a service of a public character*, and the public are interested not only in the way in which you perform your duties while you continue in that service, but are quite as much interested in the time and circumstances under which you quit that employment. *You cannot always choose your own time and place for terminating these relations.* If you were permitted to do so, you might quit your work at a time and place and under circumstances which would involve irreparable damage to your employers, and jeopardize the lives of the traveling public. Your employers owe a high duty to the public, which they are compelled to perform under severe penalties for every neglect, and they have in turn a higher claim upon you and your service than that due from the ordinary employé. This court does not assume the power to compel you to continue your service to your employers against your will, but it does undertake to *compel you to perform your whole duty* while such relations continue; and does further claim, for the purpose of ascertaining whether its orders have been violated, the right *to determine when your relations to your employer legally terminated.*"

Thereafter the hearing on the motion for attachment for contempt was continued, and on April 3d, the court announced its opinion. To the suggestion that the orders issued by him were without precedent, Judge Ricks said:

"Every just order or rule known to equity courts was born of some emergency to meet some new conditions, and was, therefore, in its time, without a precedent."

He then proceeded to discuss the case and to distinguish

[1] It was, in fact, made *ex parte* on the day the bill was filed.

between the duties of railway employés to their employers and the duties of employés to their employers in other employments, saying, that the defendants must have known that the railroad company was bound to receive and haul all interstate freight under severe penalties, and that:

> "Holding to that employer, so engaged in this great public undertaking, the relation they did, they owed to him *and to the public* a higher duty than if their service had been due to a private person. . . . In ordinary conditions as between employer and employé, the privilege of the latter to quit the former's service at his option cannot be prevented by restraint or force. . . . But these relative rights and powers *may become quite different in the case of the employés of a great public corporation, charged by the law with certain great trusts and duties to the public.* An engineer and fireman, who start from Toledo with a train of cars filled with passengers destined for Cleveland, begin that journey under contract to drive their engine and draw the cars to the destination agreed on. Will it be claimed that this engineer and fireman could quit their employment when the train is part way on its route, and abandon it at some point where the lives of the passengers would be imperilled, and the safety of the public jeopardized? . . . The very nature of their service, involving as it does the custody of human life, and the safety of millions of property, imposes on them obligations and duties commensurate with the character of the trusts committed to them. They represent a class of skilled laborers, limited in number, *whose places cannot always be supplied.* The engineers on the Lake Shore & Michigan Southern Railroad operate steam engines moving over its different divisions 2,500 cars of freight per day. They transport the products of factories, whose output must be speedily carried away to keep their employés in labor. The suspension of work on the line of such a vast railroad by the arbitrary action of the body of its engineers and firemen would paralyze the business of the entire country, entailing losses and bringing disaster to thousands of unoffending citizens. Contracts would be broken, perishable property destroyed, the traveling public embarrassed,

injuries sustained, too many and too vast to be enumerated. . . . That the necessities growing out of the vast and rapidly multiplying interests following our extending railway business make new and correspondingly efficient methods for relief essential, is evident, and the courts in the exercise of their equity jurisdiction must meet the emergencies as far as possible within the limits of existing laws *until needed additional legislation can be secured.*"

To the suggestion that this was the exercise by the court without authority of law of a power to compel the employés to perform continuous personal service, the judge said:

"In the varying circumstances under which the employers' rights to such relation are presented, it often happens that adequate protection is possible by restraining the employés from refraining to do acts which they have combined and conspired to do, and the inhibiting of which secures the relief to which the employer is clearly entitled. By such modes of procedure courts of equity are often able to afford protection where they could not do it by attempting to enforce specific performance. . . . *If the court could not compel the employé to perform by continuing in service, it would not be a contempt of court on the employé's part to exercise the right to quit the service.* It the employé quits in good faith, unconditionally and absolutely, under such circumstances as are now under consideration, he is exercising a personal right which cannot be denied him. But so long as he continues in the service, so long as he undertakes to perform the duties of engineer or fireman or conductor, so long the power of the court to compel him to discharge all the duties of his position is unquestionable, and will be exercised. As hereinbefore intimated, the duties of an employé of a public corporation are such that he can *not always choose his own time for quitting that service,* and so long as he undertakes to perform and continues his employment, the mandatory orders of the court to compel all lawful service can reach him and be enforced. *The circumstances when this freedom to quit the service continues and when it terminates* it is not now necessary to

> determine, but there *certainly are times and conditions when such right must be denied.*"

This district judge thereupon proceeded to determine this question without a jury and decided that all of the defendants except one had "quit the service under circumstances when they had a right to do so, and were, therefore, not in contempt because of such conduct;" but decided that one engineer had pretended to abandon the service intending really to continue in it, and, therefore, by failing to run his engine had been guilty of contempt.

The judge said:

> "An engineer cannot be permitted to pretend to quit the service of his company in the manner stated, with his train on the main track ten miles from his destination, and for the evident purpose of evading the order of court, which was equally in force against the employer and employé. If such an abandonment of service could be excused in law, it would leave this great corporation, operating fifteen hundred miles of railway, and moving several hundred trains of cars per day, at the mercy of its employés, and subject *the public, with its multitude of interests and rights, to irremediable injuries and losses.*"

This engineer protested that he did not intend by what he did to violate the injunction, but the judge held him guilty of contempt, and ordered him *to pay a fine of $50 and costs of the entire proceedings.*

In conclusion, the judge said:

> "This suit has afforded the court an opportunity for declaring the laws applicable to such emergencies, and *the public interests* have been thereby subserved."

And added that its orders having been fully interpreted and made public, any future violations thereof

> "will be dealt with in a spirit and purpose quite different from those which have controlled us in this case."

Toledo, Ann Arbor, etc., Railway Company v. *Pennsylvania Company*, et al. (Circuit Court, N. D. Ohio, W. D., April 3, 1893), 54 Fed. Rep. 730.

This was a motion for a temporary injunction in the previous case, against Arthur, Chief Executive of the Brotherhood of Locomotive Engineers, to restrain him from

> "issuing, promulgating, or continuing in force any rule or order of the Brotherhood which shall require or command any employés of any of the defendant railway companies to refuse to handle and deliver any interstate freight to or from the plaintiff's road."

A restraining order was issued, *ex parte*, against Arthur, and upon hearing Taft, Circuit Judge, delivered an opinion, holding,

First. That it was a violation of the Interstate Commerce Act for the defendant railroad companies to refuse to handle interstate freight to and from the road of the plaintiff company, and that the employés of those companies were guilty of a violation of the act and subject to indictment and fine if they refused to handle such freight, and that it was immaterial whether they did so, or failed to do so, with or without the orders of the company.

Second. That Arthur and all the members of the brotherhood in directing the employés of the defendant companies to refuse to handle this interstate freight were thereby aiding and abetting the employés in a violation of the Interstate Commerce Act, and clearly guilty with them as principals.

Third. That the employés, Arthur, and all members of the brotherhood thus conspiring were liable in damages to the plaintiff company for any loss that might be thereby occasioned.

Fourth. That as such damages were irreparable the plaintiff company was, therefore, entitled to a preliminary mandatory injunction against the defendant companies to compel them, pending the final hearing on the bill, to

handle interstate freight to and from the plaintiff's road.[1]

Fifth. That such an injunction might properly issue against the employés of the defendant companies.

Sixth. That Arthur, although not in the employment of the defendant companies, could be restrained from issuing any order as Chief of the Brotherhood, which would require the employés of these companies to refuse to handle this freight, and could also be required by mandatory injunction to rescind any order which he had previously issued for that purpose, and such an injunction was issued.

To the suggestion that this amounted to a mandatory injunction compelling the employés of the defendant companies to an enforced specific performance of personal service, the court said:

> "It is only an order restraining them, if they assume to do the work of the defendant companies, from doing it in a way which will violate not only the rights of the complainant, but also the order of the court made against their employers to preserve those rights.
>
> "They may avoid obedience to the injunction by actually ceasing to be employés of the company; otherwise the injunction would be, in effect, an order on them to remain in the service of the company, and no such order was ever, so far as the authorities show, issued by a court of equity. It is true that if they quit the service of the company, in order to procure or compel defendant companies to injure the complainant company, they are doing an unlawful act, rendering themselves liable to damages to the complainant if any injury is thereby inflicted, and that they may be incurring a criminal penalty, but, no matter how inadequate the remedy at law, the arm of a court of equity cannot be extended by mandatory injunction to compel the enforcement of personal service as against either the employer or the employed. It would be impracticable to enforce the relation of master and servant against the will of either. Especially is this true in the case of railway engineers,

[1] 34 Fed. Rep. 481.

> where nothing but the most painstaking and devoted attention on the part of the employé will secure a proper discharge of his responsible duties; and it would even seem to be against public policy to expose the lives of the traveling public and the property of the shipping public to the danger which might arise from the enforced and unwilling performance of so delicate a service."

United States v. *Workingmen's Amalgamated Council of New Orleans, et al.* (Circuit Court E. D. Louisiana, March 25, 1893), 54 F. R. 994.

The bill was filed by the United States under the act of 1890. The facts as stated by *Billings*, D. J., were that

> "A difference had sprung up between the warehousemen of New Orleans and their employés, and between the principal draymen and their subordinates. With the view and purpose to compel an acquiescence on the part of the employers in the demands of the employed, it was finally brought about by the employed that all the union men—that is, all the members of the various labor associations—were made by their officers, clothed with authority under the various charters, to discontinue business, and *one* of these kinds of business was transporting goods which were being conveyed from state to state and to and from foreign countries. In some branches of business the effort was made to replace the union men by other workmen. This was resisted by the intimidation *springing from vast throngs of the union men assembling in the streets*, and in some instances by violence; so that the result was that, by the intended effect of the doings of these defendants, not a bale of goods constituting the commerce of the country could be moved.

This the court held constituted a case within the statute, saying,

> "One of the intended results of their combined action was the forced stagnation of all the commerce which flowed through New Orleans. This intent and combined action are none the less unlawful because they included in their scope the paralysis of all other business within the city as well."

In this case the strike had ceased when the injunction was

granted. But the court held that the injunction should issue notwithstanding.

This was the first case in which it was held that the act of congress of July 2, 1890, known as the "Anti-Trust Act," gave equity jurisdiction to enjoin combinations of employés. The language of the act is therefore important.

The portion which it was claimed gives such jurisdiction is as follows:

Section 1 first provides that

> "Every contract, combination in the form of trust, *or otherwise*, or conspiracy, in restraint of trade or commerce *among the several states or with foreign nations* is hereby declared to be illegal."

Then follows provision making such contract, combination, or conspiracy a misdemeanor punishable by fine or imprisonment.

Section 4 provides that

> "The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the attorney general, to *institute proceedings in equity to prevent and restrain such violations.* Such proceedings may be by way of petition setting forth the cause and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed as soon as may be to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such restraining order or prohibition as shall be deemed just in the premises."

On appeal from the injunction order in this case the Circuit Court of Appeals, in an opinion by *McCormick*, Circuit Judge, affirmed the ruling below, saying, "The bill exhibited is clearly within the statute."

"The injunction only enjoined the appellants from doing

pending the suit what the statute forbids, and provides may be prevented by injunction."

57 Fed. Rep. 85.

Southern California Ry. Co. v. *Rutherford et al.* (Circuit Court, S. D. California, June 10, 1894), 62 Fed. Rep. 796.

Here upon a bill showing that the Southern California Railway Company was under a contract with the Pullman Palace Car Company to attach a Pullman car or cars on all of its through trains for the carriage of passengers and the mail, and that the employés of that company refused to operate any train to which a Pullman car was attached, Ross, district judge, issued an injunction *commanding the employés of the railway company to operate such trains while they remained in the service of the railway company.* This he put upon the ground that the refusal of the employés to operate such trains would

> "subject the railroad company to a multiplicity of suits and to great and irreparable damage, *in that there is an existing valid contract requiring the complainant to attach a Pullman car or cars on all of its through* trains for the carriage of passengers and the mail, and also retards and interrupts the railroad company in the transmission of the United States mail, and interstate commerce."

Also upon the ground that "*the rights of the public in a case of this sort should be considered.*" He said:

> "*It is manifest that for this state of affairs the law—neither civil nor criminal—affords an adequate remedy*, but the proud boast of equity is *ubi jus, ibi remedium ;* it is the maxim which forms the root of all equitable decisions. Why should not men who remain in the employment of another perform the duties which they contract and engage to perform? It is certainly just and right that they should do so, or else quit the employment. And where the direct result of such refusal works irreparable damage to the employer, and at the same time interferes with the transmission of the mail and with commerce between the states, equity, I think, *will compel them to perform*

the duties appertaining to the employment so long as they continue in it" ;

and, he added, for these reasons

> "I shall award an injunction requiring the defendants to perform all their regular and accustomed duties so long as they remain in the employment of the complainant company, which injunction, it may be as well to state, will be strictly and rigidly enforced."

Farmers' Loan and Trust Company v. *Northern Pacific Railroad Company et al.* (Circuit Court, E. D. Wisconsin, April 6, 1894), 60 Fed. Rep. 803.

This was a petition by the receivers of the Northern Pacific Railroad appointed in the above cause, praying that their employés be enjoined from a strike because of a proposed reduction of wages. A supplemental petition represented that that strike would be ordered by the executive heads of the various organizations of the employés, and prayed an injunction against them. Injunctions were issued *ex-parte*, and the case was heard upon the motion of the officers of these organizations to modify the orders.

Jenkins, Circuit Judge, heard the motion and delivered the opinion. This opinion is very elaborate, and has been the subject of special investigation by a committee of the National House of Representatives.[1] It goes beyond the proposition that a combination to prevent the operation of a railroad in the hands of receivers appointed by the court is a contempt, and discusses at large the relations between employers and employés and the powers of the court in respect to controversies arising between them. It bristles with suggestions that the action of the court is *required by the public welfare.* It adopts the decision of Judge Ricks in *Toledo &c. Railway* v. *Pennsylvania Company*, 54 Fed. Rep. 746, that an employé cannot quit the service of an employer at pleasure, but

[1] Fifty-third congress, second session, report judiciary committee, No. 1,049.

can only do so "*in a decent manner*," and "*at a decent time*," *of which the court is the judge.* It holds that a strike is unlawful, because *it is not a bona fide* abandonment of the service of the employer, but a *form of combination and conspiracy to injure the employer.* An injunction was granted against the employés upon the original petition, restraining them among other things

> "from combining and conspiring to quit, *with* or *without notice*, the service of said receivers, with the object and intent of crippling the property in their custody or embarrassing the operation of said railroad, and from so quitting the service of said receivers, *with or without* notice, as to cripple the property, or to prevent or hinder the operation of said railroad."

The injunction upon the supplemental petition embodied the provisions of the first injunction with the following additional clause:

> "And from combining or conspiring together, or with others, either jointly or severally, or as committees, or as officers, of any so-called labor organization, with the design or purpose of causing a strike upon the lines of railroad operated by said receivers or from ordering, *recommending, approving, or advising* others to quit the service of the Northern Pacific Railroad Company, on January 1, 1894, or at any other time, or from ordering, *recommending, advising, or approving*, by communication, or instruction, or otherwise, the employés of said receivers, or any of them, or of said Northern Pacific Railroad Company, to join in the strike on said January 1, 1894, or at any other time, and from ordering, *recommending*, or *advising* any committee or committees, or class or classes of employés of said receivers, *to strike or join in the strike* on January 21, 1894, *or at any other time* until the further order of this court."

Both these injunctions were issued not only to the persons named as defendants, and to their agents, sub-agents, representatives, and employés, but "*to all persons, associations and combinations, voluntary or otherwise, whether*

employés of said receivers or not, AND TO ALL PERSONS GENERALLY."

The injunctions were granted *ex-parte*, and it was upon the motion of the officers of the Brotherhood of Locomotive Engineers, the Order of Railway Conductors, the Brotherhood of Locomotive Firemen, the Order of Railway Telegraphers, the Brotherhood of Railway Train-men, and of the Switchmen's Mutual Aid Association, to modify the injunctions by striking out the foregoing provisions that the opinion was delivered. It was urged that the employés of the railroad company had a right to abandon its service, but the court said:

> "If it be conceded that the entire force of 12,000 men employed upon this railway had the legal right to abandon the service in a body, that right must be asserted and exercised *in good faith*. The abandonment of service must be actual, not pretentious. . . . If the right to quit service in a body be conceded, the case presented is the ostensible exercise of a lawful right, not in good faith, but for an unlawful purpose, to wit, the intimidation and oppression of others, and the injury to property in their keeping, tending to *the prejudice of the public*. Such a conspiracy is unlawful."

Upon the hearing the clause of the injunction "or from ordering, recommending, approving, or advising others to quit the service of the receivers of the Northern Pacific Railroad on January 1, 1894, or at any other time" was struck out, but only because, as the court said, it was comprehended within the clause restraining the heads of these organizations from ordering, recommending, or advising a strike or joinder in a strike. In all other respects the injunction was maintained.

This injunction was commented upon by a leading English law journal as follows:

> "The tremendous powers of government and control over the lives and fortunes of American citizens which may be claimed and exercised, are well shown in a case which, at the beginning

> of this year, caused much surprise in England, both to lawyers and the public; the strike of the employés of the receiver of the Northern Pacific Railway, in consequence of a notice of reduction of wages. Between three and four thousand workingmen determined to quit work in consequence. Two weeks before the new schedule was to come into effect, the receivers obtained from the circuit judge an injunction restraining the men and their unions from 'combining and conspiring to quit with or without notice, the service of the roads.' The scope of injunctions is wider in America than with us; but this extraordinary endeavor, whether under the head of contempt of court or as an assumption of jurisdiction *to compel the specific performance of contract service*, could not be passed by without protest. It was really *placing large masses of workmen engaged upon great industrial undertakings under a slavery regime.*"[1]

Upon appeal from the injunction order, the case was heard before *Harlan*, Circuit Justice, *Woods*, Circuit Judge, and *Bunn*, D. J., in the Circuit Court of Appeals, and an opinion delivered October 1, 1894.[2]

The opinion delivered by Harlan was most elaborate, and held among other things that

> "The rule is without exception that equity will not compel the actual affirmative performance by an employé of merely personal services, any more than it will compel an employer to retain in his personal service one who, no matter for what cause, is not acceptable to him for service of that character."

And that the

> "exercise by the receivers of their right to adopt a new schedule of wages could not be made to depend upon considerations of hardship and inconvenience to employés, and the exercise by employés of their right to quit in consequence of the proposed reduction of wages could not be made to depend upon considerations of hardship or inconvenience to those interested in the trust property, or to the public. The fact that employés of

[1] 97 London Law Times, 384-5.
[2] 63 Fed. Rep. 310.

railroads may quit under circumstances that would show bad faith on their part, or a reckless disregard of their conduct, or of the convenience and interest of both employer and the public, does not justify a departure from the general rule that equity will not compel the actual affirmative performance of merely personal services, or (which is the same thing) require employés against their will to remain in the personal service of their employer. Therefore the court below should have eliminated from the writ of injunction the words, 'and from so quitting the service of the said receivers, with or without notice, as to cripple the property or prevent or hinder the operation of said railroad.'"

But the opinion says that different considerations must control in respect to the words

"and from *combining* and *conspiring* to quit with or without notice the service of said receivers with *the object and intent* of crippling the property in their custody, or embarrassing the operation of said railroad."

. . . "While the right of a body of employés affected by proposed reduction of wages to demand a given rate of compensation as a condition of remaining in the service is absolute and perfect, that is a very different matter from a *combination* and *conspiracy* among employés with the *object and intent*, not simply of quitting the service of the receivers because of the reduction of wages, but of *crippling the property* in their hands, and *embarrassing the operation* of the employer's business."

But the opinion says

"The general inhibition against combinations and conspiracies formed with the object and intent of crippling the property and embarassing the operation of the railroad must be construed as *referring only to acts of violence, intimidation, and wrong*, and not as embracing the case of employés who, being dissatisfied with the proposed reduction of their wages, merely withdraw on that account, singly or by concerted action from the service, *using neither force, threats, persecution, nor intimidation* towards employés who do not join

them, nor any device to molest, hinder, alarm, or interfere with others who take, or desire to take, their places."[1]

After further discussion with regard to combinations and conspiracies the opinion states the law as follows:

"An intent upon the part of a single person to injure the rights of others or of the public is not in itself a wrong of which the law will take cognizance, unless some injurious act be done in execution of the unlawful intent. But a combination of two or more persons with such an intent, and under circumstances that give them, when so combined, a power to do an injury they would not possess *as individuals acting singly*, has always been recognized as in itself wrongful and illegal."

The opinion then cites and quotes from numerous authorities, and ends by saying:

"It seems entirely clear, upon authority, that any combination or conspiracy upon the part of these employés would be illegal, which has for its object to cripple the property in the hands of the receivers, and to embarrass the operation of the railroads under their management, either by disabling or rendering unfit for use engines, cars, or other property in their hands, or by interfering with their possession, or by actually obstructing their control and management of the property, or by using force, intimidation, threats, or other wrongful methods against the receivers or their agents, or against employés remaining in their service, or by using like methods to cause employés to quit or prevent or deter others from entering the service in place of those leaving it. Combinations of that character *disturb the peace of society*, and are mischievous in the extreme. They imperil *the interests of the public*, which may rightfully demand that the free course of trade shall not be unreasonably obstructed. They endanger the personal security and the personal liberty of individuals who in the exercise of their inalienable privilege of choosing the terms upon which they shall labor, enter, or attempt to enter, the service of those against whom such combinations are specially aimed. And as acts of the character referred to would have defeated a proper

[1] Here the court refer to the word "device" as used in *Sherry* v. *Perkins*, 147 Mass. 212. Also to *Spinning Co.* v. *Riley*, L. R., 6 Eq. 551.

> administration of the trust estate, and inflicted irreparable injury upon it, *as well as prejudiced the rights of the public*, the circuit court properly framed its injunction so as to restrain all such acts as are specifically mentioned, as well as combinations and conspiracies having the object and intent of physically injuring the property, or of actually interfering with the regular, continuous operation of the railroad by the receivers."

Upon the question whether a strike was necessarily unlawful as held by the circuit court, the opinion held that a strike was not necessarily illegal, citing *Farrar* v. *Close*, L. R., 4 Q. B., 602, 612, quoting from Sir James Hannen's opinion therein as follows:

> "I am, however, of opinion that strikes are not necessarily illegal. A 'strike' is properly defined as a simultaneous cessation of work on the part of the workmen; and its legality or illegality must depend on the means by which it is enforced, and on its objects. It may be criminal, as if it be a part of a combination for the purpose of injuring or molesting either masters or men; or it may be simply illegal, as if it be the result of an agreement depriving those engaged in it of their liberty of action, similar to that by which the employers bound themselves in the case of *Hilton* v. *Eckersley*, 6 El. & Bl. 47, 66; or it may be perfectly innocent, as if it be the result of the voluntary combination of men for the purpose only of benefiting themselves by raising their wages, or for the purpose of compelling the fulfilment of an engagement entered into between the employers and employés, or any other lawful purpose."

Therefore the opinion held that the order should describe more distinctly than it did the strike which the injunction was intended to restrain.

Upon the question of the expediency of exercising the equity power of the court to restrain that which if committed would be a crime, the opinion says:

> "That some of the acts enjoined would have been criminal, subjecting the wrongdoers to actions for damages or to crim-

inal prosecution, does not, therefore, in itself determine the question as to interference by injunction. If the acts *stopped at crime*, or involved *merely crime*, or if the injury threatened could, if done, be adequately compensated in damages, equity would not interfere. But as the acts threatened involved irreparable injury to and destruction of *property* for all the purposes for which that property was adapted, as well as continuous acts of trespass, to say nothing of the *rights of the public*, the remedy at law would have been inadequate."

United States v. *Debs* (64 F. R., 724). Injunction issued July 2d, 1894, against eighteen defendants by name and "all persons combining and conspiring with them, and *all other persons whomsoever*." The injunction concluded as follows:

"And it is further ordered that the aforesaid injunction and writ of injunction shall be in force and binding upon such of said defendants as are named in said bill, from and after the service upon them severally of said writ by delivering to them severally a copy of said writ or by reading the same to them, and the service upon them respectively of the writ of subpœna herein, and shall be binding upon said defendants, *whose names are alleged to be unknown*, from and after the service of such writ upon them respectively, by the reading of the same to them, *or by the publication thereof by posting or printing*, and after service of subpœna upon any of said defendants named herein, shall be binding upon said defendants, *and upon all other persons whatsoever who are not named herein from and after the time when they shall severally have knowledge of such order and the* existence of said injunction."

This was the "Chicago strike" case, and is more fully stated hereafter.

United States v. *Elliott et al.* (Circuit Court, E. D. Missouri, July 6, 1894), 62 Fed. Rep. 801.

Here on a bill by the United States under the Act of July 2, 1890, a preliminary injunction was issued by *Thayer*, D. J.,

to restrain a conspiracy to interfere with interstate commerce between the city of St. Louis and points in other states. In granting the injunction, the judge said that

> "The unusual character of the bill filed by the government renders it proper that the court should state briefly the reasons that have influenced this action. . . . But the court is not called upon in this instance to consider whether the proceeding falls within the ordinary jurisdiction of a court of equity. The fourth section of the act of July 2, 1890, makes the jurisdiction of the court clear over the parties and subject-matter. . . . A combination to arrest the operation of railroads whose lines extend from a great city into adjoining states until such roads accede to certain demands made upon them, whether such demands are in themselves reasonable or unreasonable, just or unjust, is certainly an unlawful conspiracy in restraint of commerce among the states."

A demurrer to the bill was subsequently overruled by *Phillips*, D. J., (64 Fed. Rep. 27).

This injunction was issued *ex-parte* against 132 defendants named in the original bill, and afterwards against about 250 more added as defendants. It enjoined the defendants "and all persons acting in concert under their direction and control," and provided that it should be binding on the named defendants after personal service upon them, but it also provided that the injunction "shall be binding upon said defendants, *whose names are not stated*, but who are within the terms of this order from and after the service of such writ upon them respectively by the reading of the same to them, or by the delivery of a copy thereof to them."

Thomas v. *Cincinnati, etc. Railway Company* (Circuit Court, S. D. Ohio, July 13, 1894), 62 Fed. Rep. 803.

This was a petition by receiver of defendant railway against one Phelan, a member of the American Railway Union, to punish him for contempt in interfering with the operation of the railroad by the receiver, and for an injunction.

Taft, Circuit Judge, found as a fact that Phelan had conspired with the other officers of the union, *to call out the receiver's employés, for the purpose of stopping the business of the railroad* and held that this was an unlawful interference with the operation of the road, and a contempt of the court. He also said:

> "More than this, this combination is in the teeth of the act of July 2, 1890,"

citing the decision of Judge Billings in 54 Fed. Rep. 994, and other similar decisions, and saying that although a different view had been taken by *Putnam*, J.,[1] he was unable to agree with that view. He therefore sentenced Phelan to six months' imprisonment in the county jail.

China Company v. *Brown et al.* (October 9, 1894), 164 Penn. 449.

The plaintiff was a manufacturing corporation, and ordered one department of its works to be closed, whereupon their employés in other departments, being members of a local union, quit work, and refused to permit others to work for the plaintiff. The bill alleged this, and also showed that the defendants had endeavored to prevent others from working for the plaintiff by gathering in crowds about the plaintiff's place of business, and at the boarding places of the workmen, by following the workmen to and from their work, stopping them on the highways, interfering with them in their work, and holding them up to ridicule and contempt of outsiders. An injunction was

[1] *United States* v. *Patterson* (Circuit Court, Mass. D., February 28, 1893), 55 Fed. Rep. 605, 641.

Here *Putnam*, J., held that the statute of 1890 did not authorize the court to restrain an attempt to drive competitors out of the field by violence, annoyance, intimidation, or otherwise, saying that if it did the inevitable result would be

> "That the federal courts will be compelled to apply this statute to all attempts to restrain commerce among the states, or commerce with foreign nations, by strikes or boycotts, and by every method of interference by way of violence or intimidation. It is not to be presumed that Congress intended thus to extend the jurisdiction of the courts of the United States without very clear language. Such language I do not find in the statute."

ordered, restraining the defendants, twenty-seven in number, by name, from these acts.

Barr et al. v. *Essex Trade Council, the Typographic Union, No. 103 of Newark, et al.* (October, 1894), 53 N. J. Eq., 101, 136.

This is one of the best-considered cases on this subject. The plaintiffs were the proprietors of a daily newspaper in Newark, N. J. The defendants were incorporated and voluntary associations of workmen. The plaintiffs introduced a new method of making up their paper for publication by the use of what was called "plate matter." The defendant unions, the individual members of which it was shown represented a purchasing power of $400,000 a week, thereupon issued circulars calling upon the public to "boycott" the *Newark Times*, "cease buying it, cease handling it, cease advertising in it." By this and similar means they induced persons to refuse to buy the plaintiffs' paper, or to advertise in it, and injured and were continuing to injure the plaintiffs' business.

The court said that "a man's business is property," and quoted from 16 Wallace 116, that "a calling when chosen is a man's property and right"; said that the plaintiffs' business of publishing his paper, with the incidents of its circulation and advertising, was as much their property as the types and presses upon which the paper was printed, and therefore the conduct of the defendants was an injury to the plaintiffs' property. It also held that the conduct of the defendants, although not actuated by personal malice against the plaintiffs, or by any desire permanently to injure their business, was malicious *because the inevitable consequence of it was to injure the plaintiffs' business* (citing 23 Fed. Rep. 750). Also that this conduct was an attempt to intimidate and force the plaintiffs by *fear of injury to their business* as property to submit to the defendants' demands as to how they should conduct their business, and was therefore an attempt to *intimidate and coerce.*

The court then made an elaborate review of the authorities, citing especially *Casey* v. *Typographic Union*, 45 Fed. Rep. 135, *Cœur d'Alene Mining Company* v. *Miners' Union*, 51 Fed. Rep. 260, *Blindell* v. *Hagan*, 54 Fed. Rep. 40, *Sherry* v. *Perkins*, 147 Mass. 212, and in conclusion held that as the conduct of the defendants was a continuing injury to the private property of the plaintiffs in their business, it must be enjoined, and issued an injunction restraining the defendants

> "from distributing or circulating any circulars, printed resolutions, bulletins, or other publications containing appeals or threats against the *Newark Times*, or the complainants, its publishers, with the design and tending to interfere with their business in publishing said paper, and from making any threats or using any intimidation to the dealers or advertisers in such newspapers tending to cause them to withdraw their business from such newspaper."

Elder et al. v. *Whitesides et al.* (Circuit Court, E. D. Louisiana, March 22, 1895), 72 Fed. Rep. 724.

Here citizens of England, owners of steamships between Liverpool and Gretna, Louisiana, filed a bill alleging that the defendants had combined and conspired to prevent the loading or unloading of the plaintiffs' steamships except by such labor as might be acceptable to the defendants, and had thereby absolutely prevented the plaintiffs from loading or unloading their steamships at that port by other than the defendants and their confederates. The plaintiffs filed affidavits showing the combination and conspiracy. The defendants filed their affidavits denying that they had interfered with the plaintiffs, or prevented the loading of their vessels, or caused damage to the plaintiffs. There was *no allegation or proof of any overt act* committed by the defendants.

Parlange, D. J., found that the combination and conspiracy existed, and upon the authority of the opinion in *Arthur* v. *Oakes*, held that the defendants should be enjoined, and issued an injunction accordingly.

United States v. *Debs*, 64 Fed. Rep. 724 (Circuit Court, N. D. Ill., December 14, 1894).

July 2, 1894, the United States filed a bill in the Circuit Court, under the "Anti-trust Act" of 1890, against Eugene V. Debs and others, and the American Railway Union, alleging that the defendants had engaged in a conspiracy to interfere with and prevent the transportation of the mails and interstate commerce upon all the railroads doing business in the city of Chicago, twenty-three in number.

An *ex-parte* injunction was issued on the same day, whereby "the defendants and all persons combining and conspiring with them, and *all persons whomsoever*" were enjoined from in any manner interfering with the business of these railroads as carriers of interstate passengers and freight, and also among other things

> "from compelling or inducing, or attempting to compel or induce by threats, intimidation, *persuasion*, force, or violence, any of the employés of any of said railroads *to fail or refuse to perform any of their duties* as such employés in connection with the interstate business or commerce of said railroads, or the carriage of the United States mail."

July 17th, informations were filed against the defendants, charging that they had violated this injunction.

August 1st, and 2nd, information of the same character was filed against one James Hogan and others, who were not parties to the bill.

All these persons appeared and filed full and unequivocal answers denying that they had violated the injunction. They also demurred to the bill, and claimed that the court had no jurisdiction.

Woods, Circuit Judge, found that the defendants had interfered with and interrupted interstate commerce and the carriage of the mails, and that this constituted *a public nuisance*, and held that a court of equity had jurisdiction upon bill or information by the attorney-general on behalf of the state to enjoin such a nuisance. The defendants claimed

that in the absence of legislation by Congress the federal courts had no such jurisdiction. The United States attorney claimed that such jurisdiction was given by the Interstate Commerce Act, by which the federal government had assumed the regulation of interstate commerce by rail, and also that jurisdiction existed at the suit of the government to protect its property right in the mails.

The main contention of the United States, however, was that equity jurisdiction was given by the Act of 1890. The court said that while there were

> "strong and convincing reasons to justify the injunction for the purpose of protecting against obstruction either the mails or inter-state commerce, independent of the Act of 1890,"

there seemed to be no precedent for so holding, and the responsibility of making a precedent need not then be assumed. The court then proceeded to consider whether the Act of 1890 gave jurisdiction, saying:

> "It was under that act that the injunction order was asked and was granted, but it has been seriously questioned in these proceedings, as well as by an eminent judge[1] and by lawyers elsewhere, whether the statute is by its terms applicable, or consistently with constitutional guaranties can be applied to cases like this."

The court then analyzed the statute, cited the decisions of the supreme court upon the power of congress to regulate commerce, and held:

First: That it was competent for congress to authorize the federal courts to enjoin all obstructions of interstate commerce on railroads where such obstruction amounted to what would be a public nuisance on a public highway, and that the Act of 1890 did give such authority, saying:

> "My conclusion is clear that under the Act of 1890 the court had jurisdiction of the case presented in the application, and the injunction granted was valid."

[1] *Putnam*, J., in *United States* v. *Patterson*, 55 Fed. Rep. 605.

He then examined the facts upon proofs and held that all the defendants except one had violated the injunction, and sentenced them to imprisonment in the county jail for terms varying from three to six months, and they were committed to jail.

In this connection it is interesting to note the evolution of the idea that combinations of laborers are within the scope of the Act of July 2, 1890, known as the "Sherman Anti-Trust Law." This act, it is safe to say, was not supposed by anybody at the time of its passage to be directed against combinations other than those of capital. Its passage was in fact promoted solely for the purpose of restraining combinations of capital that might interfere with the proper conduct of interstate commerce. It was first officially discussed in the annual report of the attorney-general for 1893, where its scope and purpose were considered, and in that report the learned attorney-general, Richard Olney, said:

> "It should, perhaps, be added in this connection—as strikingly illustrating the perversion of a law from the real purpose of its authors—that in one case the combination of laborers in a strike was held to be within the prohibition of the statute,[1] and that in another, Rule 12 of the Brotherhood of Locomotive Engineers, was declared to be in violation thereof. In the former case in answer to the suggestion that the debates in congress showed the statute had its origin in the evils of massed capital, the judge, while admitting the truth of the suggestion, said: 'The subject had so broadened in the minds of the legislators that the source of this evil was not regarded as material, and the evil in its entirety is dealt with. They made the interdiction include combinations of labor as well as of capital; in fact, all combinations in restraint of commerce, without reference to the character of the persons who entered into them.'"

It thus appears that the attorney-general did not then consider that this act applied to combinations of laborers.

[1] *United States* v. *Workingmen, &c.*, 54 Fed. Rep. 990.

But in 1894, the same attorney-general, upon the suggestion of the United States attorney for Arkansas, referring to the same decision quoted by the attorney-general in his report for 1893, directed a bill to be filed under the act in the name of the United States, in the federal courts, against the American Railway Union and others to restrain them from interfering with the United States mail and interstate commerce.[1]

This shows that the "subject had so broadened in the mind" of the learned attorney-general that he then regarded the statute as covering combinations of laborers. And it is to be specially noticed that under this view of the statute every bill which the attorney-general directed to be brought to restrain obstruction to interstate commerce and the transmission of the mails, arising out of the labor disturbances of 1894, was specifically brought by his direction under this Act of 1890. And yet, when the question as to the jurisdiction of a federal court to entertain a suit in equity by the government to enjoin obstructions to interstate commerce and the transmission of the mails by combinations of striking laborers was argued in the supreme court in the Debs case, the same attorney-general, while saying that it was "almost too plain for discussion" that the Act of 1890 was "complete authority for the bill," specifically asked the court to disregard the Act of 1890 under which the suit against Debs and others was brought, and in which he was committed for contempt for violating the injunction issued thereunder, and urged the court to put the jurisdiction of the federal court upon the broad ground that as congress had under the constitution exclusive control of interstate commerce and of the transmission of the mails, and had exercised that control by the Interstate Commerce Act and acts establishing mail routes, therefore it could maintain suits in its own courts to restrain any obstruction to interstate commerce or to trans-

[1] Appendix to Rep. Atty. Gen'l, 1896, *p.* 10.

mission of the mails, upon the ground that such obstruction was a public nuisance. He said:

> "Under all the circumstances it seems to me quite inadvisable that the jurisdiction of the court below should be thought to turn upon the government's technical relation to the mails and the mail bags, or should appear to depend upon *the novel provisions of an experimental piece of legislation like the Act of 1890.*"

And it was upon this "broad ground" of exclusive control of interstate commerce alone that the supreme court did sustain the jurisdiction of the circuit court, saying at the conclusion of its opinion:

> "We enter into no examination of the Act of July 2nd, 1890, upon which the circuit court relied mainly to sustain its jurisdiction. It must not be understood from this that we dissent from the conclusions of that court in reference to the scope of the act, but simply that we prefer to rest our judgment on the broader ground which has been discussed in this opinion, believing it of importance that the principles underlying it should be fully stated and affirmed."

After Debs and others had thus been proceeded against and punished by the circuit court *solely under the Act of 1890*, they applied to the supreme court for a writ of error and a writ of habeas corpus upon the ground that the circuit court had no jurisdiction under the Act of 1890, or otherwise. The case in the supreme court is reported as "*In re Debs, petitioner*," 158 U. S., 564.

The petition for a writ of error was denied January 17th, 1895, on the ground that the order committing the defendants for contempt was not a final judgment or decree. The sole question then remaining was that raised by the petition for a writ of habeas corpus, to wit, whether the circuit court *had jurisdiction* of the case made by the bill of the United States.

In that court, as I have said, the bill had been brought and was sustained by the court solely upon the provisions

of the Act of 1890. But upon argument in the supreme court the attorney-general claimed that congress had by various acts (especially by the Interstate Commerce Act of 1887) assumed exclusive control of interstate commerce by rail, and of carrying the mails, and that congress had thereby not only prohibited action in relation to the interruption of such commerce *by the states*, but had in effect prohibited all persons *in their private capacities* from interfering with interstate railroad transportation, and the mails, and, therefore, as interstate railroad transportation and the mails were in the exclusive keeping of the United States, any interference with them by private persons authorized the government to maintain an information or bill in equity for the protection of the public rights involved, without any specific statutory authority to the federal courts to entertain such a bill, citing *United States* v. *American Bell Telephone Co.*, 128 U. S. 315, 367.

The court in its opinion by Brewer, J., took this view, saying that although congress may prescribe by legislation that any interference with these matters shall be offences against the United States, prosecuted and punished by indictment, and although the executive may, without any legislation, put down such an interference as an obstruction to interstate commerce and transportation of the mails, yet a suit may also be maintained for the same purpose.

The opinion says:

> "The strong arm of the national government may be put forth to brush away all obstructions to the freedom of interstate commerce, or the transportation of the mails. If the emergency arises, the army of the nation and all its militia are at the service of the nation to compel obedience to its laws. . . . But the right to use force does not exclude the right of appeal to the courts for a judicial determination and for the exercise of all their powers of prevention. Indeed, it is more to the praise than to the blame of the government that instead of determining for itself questions of right and wrong on the part of these petitioners and their associates, and enforcing

> that determination by the club of the policeman and the bayonet of the soldier, it submitted all those questions to the peaceful determination of judicial tribunals, and invoked their consideration and judgment as to the measure of its rights and powers, and the correlative obligations of those against whom it made complaint."

In passing, the court say that it cannot be doubted that the government, by virtue of its property interest in the mails, has such an interest in the subject matter sought to be protected by the injunction as to entitle it to appear as a party plaintiff as a property owner, citing, *Searight* v. *Stokes*, 3 How. 151, 169.

But the decision is put essentially upon the proposition that

> "*Every government, entrusted by the very terms of its being with powers and duties to be exercised and discharged for the public welfare, has a right to apply to its own courts for any preliminary assistance in the exercise of the one and the discharge of the other*, and it is not sufficient answer to its appeal to one of those courts that it has no pecuniary interest in the matter. The obligations which it is under to promote the interest of all and to prevent the wrongdoing of one to the injury of the general welfare, is often of itself sufficient to give it a standing in court. . . . While it is not the province of the government to interfere in any mere matter of private controversy between individuals, or to use its great powers to enforce the rights of one against the other, yet whenever the wrongs complained of are such as to affect the public at large, and are in respect to matters which are by the constitution entrusted to the care of the nation, and concerning which the nation holds the duty to all the citizens of securing to them their common rights, then the mere fact that the government has no pecuniary interest in the controversy is not sufficient to exclude it from the courts, or to prevent it from taking measures therein to fully discharge those constitutional duties."

The opinion then cites numerous authorities to the prop-

osition that a public nuisance may be enjoined at the suit of the state by an information filed by the attorney-general, or proper law officer of the state, and says that this doctrine which is well established in the states, applies in the federal government with regard to public nuisances in respect to all matters within the exclusive control of the federal government.

As to the objection which was strenuously urged that the injunction was in effect only a command against the commission of crimes, and that punishment for the commission of the acts enjoined was, therefore, in effect a punishment for crime without a trial by jury, the court say that

> "There is not in this any invasion of the constitutional right of trial by jury. . . . We fully agree that it matters not what form the attempt to deny constitutional right may take, it is vain and ineffectual and must be so declared by the courts, and we reaffirm the declaration in *Boyd* v. *United States*, 116 U. S. 616, 635, that 'it is the duty of courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon.' But the power of a court to make an order carries with it the equal power to punish for disobedience of that order, and the inquiry as to the question of disobedience has been from time immemorial the special function of the court. In order that the court may compel obedience to its orders it must have the right to inquire whether there has been any disobedience; therefore (quoting from *Watson* v. *Williams*, 36 Miss. 331, 341), the power to fine and imprison for contempt from the earliest history of jurisprudence has been regarded as a necessary incident and attribute of a court without which it could no more exist than without a judge."

Also (quoting from Cartwright's case, 114 Mass. 230, 238)

> "the summary power to commit and punish for contempts tending to obstruct or degrade the administration of government is inherent in our courts of chancery and other superior

> courts as essential to the execution of their powers and to the maintenance of their authority, and is part of the law of the land within the meaning of *Magna Charta* and of the twelfth article of our Declaration of Rights."
>
> "In brief, a court enforcing obedience to its orders by proceedings for contempt is not executing the criminal laws of the land, but only *securing to suitors the rights which it has adjudged them entitled to.*"

The opinion of the court might well have stopped at this point. It had declared—

First. The exclusive control of the federal government over interstate commerce and the mails.

Second. The right of the federal government in that control to remove every obstruction, natural or artificial, to interstate commerce or the mails.

Third. The power of the federal government through the executive branch to forcibly remove all such obstructions.

Fourth. The power of the federal government to maintain a suit in its own courts for an inquiry and determination as to the existence and character of such obstruction.

Fifth. The power of an equity court upon such a suit by the government to order such an obstruction to be removed, or to restrain its being created, and to enforce its command to remove such an obstruction or to refrain from creating such an obstruction by injunction and by punishment for contempt in violating such injunction.

It necessarily followed from these propositions that the circuit court *had jurisdiction* of the bill by the federal government alleging such obstructions, and as that was the *only question* before the supreme court upon the petition for habeas corpus the petition was necessarily dismissed.

Attorney-General v. *Corbett et al.*, Am. L. Reg. N. S. 100, 1895.

This was a bill in equity by the attorney-general of Arkansas to restrain a prize fight as a breach of the peace

and a public nuisance. The chancellor, to whom it was addressed, was by statute made a "conservator of the peace throughout the state." As such he had power to hold persons liable to commit breach of the peace in bonds not exceeding five hundred dollars to keep the peace, but it was admitted that this would not prevent the fight, and he therefore held that he could enjoin the fight, and punish a violation of the injunction as a contempt, saying,

> "It were the rankest folly, the sheerest nonsense, to direct an officer to conserve the peace throughout the state, and then deny him the necessary jurisdiction and power to do so whenever an emergency should arise which demands the exercise of such powers as may be necessary to accomplish the purpose. . . . It is true a court of equity under our system of laws cannot administer punitive justice except for contempt, but may preventive justice in proper cases, and I feel that if there were more preventive justice administered a vast deal of misery would be spared the innocent. . . . . Here a comparatively small part of the state in league with a few prize fighters and their trainers, banded together in a collusive determination to openly violate the statutes of the state, flinging defiance in its face, say to the constituted authorities of the state government: 'We will be protected by local authorities, and you are powerless *to vindicate the majesty of your laws*, to preserve the good name of the state, to uphold its institutions, or *to conserve its peace.* The governor has run the gamut of executive functions to find legal power or authority lodged in him as the chief executive to lay hold of the threatened infractions of the statute, and by reason of the restrictive constitutional limitations upon his power he can legally do nothing without the aid of some court to accomplish a proper conservation of the peace in that part of Arkansas's domain. It follows . . . that unless a court of equity has jurisdiction to prevent the contemplated acts complained of, there is practically no remedy, and *the state would be powerless to prevent its laws being treated with contempt*, and *unable to put a quietus upon a vaunted defiance of its sovereignty and authority.*'"

For these reasons and because the fight would be a public nuisance as well as a breach of the peace, the chancellor enjoined them, saying the remedy for public nuisances

> "must be either preventive or punitive, the one accomplishing by injunction, and the other by an indictment on the part of the public. The most effectual, humane and flexible remedy is that of injunction. Under this form, the court can prevent that being done which if done would cause a nuisance. *It can command an observance of the peace before it is broken.*"

Shoe Company v. *Saxey*, 131 Mo. 212 (decided October, 1895).

Here striking employés of a shoe company were enjoined from picketing, obstructing access to the plaintiff's place of business, and intimidating and threatening other persons to induce them to leave the employment of the company. The court cited *Sherry* v. *Perkins*, 147 Mass. 212, and the cases in the federal courts.

Davis v. *Zimmerman*, 98 (N. Y. Supreme Court) 489. (Decided December, 1895).

The plaintiff was a cap manufacturer, and his striking employés who had gone out were enjoined against picketing and by threats and intimidation preventing others from entering his employment, and inducing those who had not gone out to go out, upon the ground that this conduct was an irreparable injury to the business of the plaintiff.

Vegelahn v. *Guntner et al.* (Supreme Court of Massachusetts; argued March 24, 1896, decided October 26, 1896), 167 Mass. 92.

This was a bill filed December 7, 1894, against fourteen individuals and two trades-unions, alleging that the plaintiff was a furniture manufacturer in Boston, and employing a large number of men, and that November 21, 1894, without notice the individual defendants left the plaintiff's employment and premises in a body; that the plaintiff had endeavored to employ other men to fill their

places and carry on his business, but the defendants had patrolled the streets in front of his premises continuously, and blocked up the doorway and entrance of his premises, used indecent language to those who had taken the places made vacant by the defendants in his employment, had interfered with and intimidated persons who desired to visit the plaintiff's premises to be employed, and for the purpose of trading, and had threatened persons whom he had employed to take the places of the defendants with bodily harm if they continued in his employment, and had caused new men so employed to leave his employment; that they had notified the insurance companies that his property was in danger and had attempted to procure the companies to cancel the insurance on his property; that they had followed the plaintiff's delivery team in various places and cities, and had been to his customers and threatened to injure them in their business if they continued to trade with him.

At the preliminary hearing a temporary injunction was issued restraining the defendants from interfering with the plaintiff's business by patrolling the sidewalk or street in front of his premises for the purpose of preventing any one in his employment or desirous of entering the same, from entering his employment or continuing in it; and also from obstructing or interfering with any person entering or leaving the plaintiff's premises, or intimidating by threats, or otherwise, any persons who might be in the employment of the plaintiff, or desiring to enter it, from so doing.

Upon the final hearing it was found that the defendants had conspired to prevent the plaintiff from getting workmen, and thereby carrying on his business unless he would adopt a schedule of prices satisfactory to them, and for no other purpose, and that the means adopted were, first, persuasion and social pressure, which affected the plaintiff disadvantageously. The court ruled that the employment of these means for the purpose of compelling the plaintiff to accede to the schedule of prices was lawful.

But the court found that as a further means the defendants had conveyed threats of personal injury or unlawful harm to persons seeking employment or employed, and ruled that this was unlawful and should be enjoined. As to the patrol in front of the plaintiff's premises, the court found that it consisted of two men changed every hour, and continued from half past six in the morning until half past five in the afternoon, on a busy Boston street, but ruled that this patrol, *so far as it was confined to persuasion and giving notice of the strike* was not unlawful, and limited the injunction accordingly.

The court also found some evidence of persuasion to break existing contracts, and declared that this was an unlawful interference with the rights of the employer and the employed, and when instituted for the purpose of interfering with the plaintiff's business became a private nuisance.

As to the claim that the defendants' acts were justifiable, because they were only to secure better wages for themselves by compelling the plaintiff to accept their schedule of wages, the court said this motive or purpose did not justify maintaining the patrol, and was not within allowable competition.

As to the suggestion that the defendants' acts might subject them to an indictment the court said this would not prevent the issue of an injunction, citing among other cases the *Debs case*, 158 U. S., and the *Ann Arbor cases*, 54 Fed. Rep.

The court also held that this interference was not justifiable, although it was with persons who were under no existing contract with the plaintiff; that such conduct was unlawful in any event, and the injunction should not be limited so as to relate only to persons who were bound by existing contracts, citing among other cases *Flood* v. *Jackson*, 11 T. L. R. 276.[1]

[1] Since reversed in the House of Lords. See *The Times*, L. R. Vol. 14, *p.* 125.

Field, C. J., delivered an opinion discussing the matter of issuing injunctions in cases of this kind and criticising the decisions in *Sherry* v. *Perkins* and *Spinning Company* v. *Riley*.

He also said that he was not convinced that to persuade one person not to enter the employment of another by telling the truth to him about such other person and his business, was actionable at common law, whatever the motive might be. He said in the present case

> "If the establishment of a patrol is using intimidation or force within the meaning of our statutes, it is illegal and criminal; if it does not amount to intimidation, or force, but is carried to such a degree as to interfere with the use by the plaintiff of his property, it may be illegal and actionable, *but something more is necessary to justify issuing an injunction;* if it is in violation of any ordinance of the city regulating the use of streets, there may be a prosecution for that, and the police can enforce the ordinance; but if it is merely a peaceful mode of finding out the persons who intend to go to the plaintiff's premises to apply for work, and of informing them of the actual facts of the case in order to induce them not to enter into the plaintiff's employment, in the absence of any statute relating to the subject I doubt if it is illegal, and I see no ground for issuing an injunction against it."

Holmes, J., who issued the preliminary injunction, and heard the case, also delivered an opinion dissenting from the propositions stated by the majority of the court, and saying that a patrol of two men did not necessarily carry with it a threat of bodily harm, and that if it did, the modified injunction made upon the final hearing covered it. He also said that

> "the policy of allowing free competition justifies the intentional inflicting of temporal damage, including the damage of interference with a man's business, by some means, when the damage is done not for its own sake, but as an instrumentality in reaching the end of victory in the battle of trade. . . . The only debatable ground is the nature of the means by

> which such damage may be inflicted. We all agree that it cannot be done by force or threats of force. We all agree, I presume, that it may be done by persuasion to leave a rival's shop and come to the defendant's. It may be done by the withdrawal, or threat to withdraw, such advantages from third persons who have a right to deal or not to deal with the plaintiff, as a means of inducing them not to deal with him either as customers or servants."

He said that in *Sherry* v. *Perkins* it appeared that the threats and intimidation there enjoined were of personal violence and intimidation by causing fear of personal violence. As to the general question of the propriety of dealing with this kind of case by injunction the court said nothing, as the defendants had no objection to the final decree.

Curran v. *Galen*, N. Y. Court of Appeals, 152 N. Y. 33; 46 N. E. Rep. 297 (March 2, 1897).

Here a labor union and a brewers' association made a contract that all laborers in the companies belonging to the association should belong to the union, and no employé should work for a company more than four weeks without becoming a member of the union. Curran worked for a company more than four weeks and refused to join the union. The union then requested the company to discharge him and it did so. Curran then sued the members of the union who thus procured his discharge, for conspiracy to injure him. They replied that they requested Curran's discharge "solely in pursuance of the agreement, and without intent or purpose to injure the plaintiff in any way."

Upon demurrer the court at the trial term held the demurrer not good. Upon appeal the general term held it good[1] and upon appeal to the court of appeals the demurrer was sustained upon the ground that the contract was against public policy and void. The Court said,—

> "Public policy and the interests of society favor the utmost freedom in the citizen to pursue his lawful trade or calling, and

[1] 29 N. Y. Sup Ct. 116.

> if the purpose of an organization or combination of workmen be to hamper or to restrict that freedom, and through contracts or arrangements with employers, to coerce other workmen to become members of the organization and to come under its rules and conditions under the penalty of the loss of their positions and of deprivation of employment, then that purpose seems clearly unlawful and militates against the spirit of our government and the nature of our institutions. . . . The contract is, in effect, a threat to keep persons from working at the particular trade and procure their dismissal from employment. While it may be true, as argued, that the contract was entered into, on the part of the Ale Brewers' Association with the object of avoiding disputes and conflicts with the workingmen's organization, that feature and such an intention cannot aid the defense, nor legalize a plan of compelling workmen not in affiliation with the organization to join it, at the peril of being deprived of their employment and of means of making a livelihood."

I have stated this case as showing an interesting phase of labor controversy though the question of the exercise of equity power to enjoin did not arise in it.

Consolidated Steel, &c., Co. v. *Murray*, Circuit Court N. D. Ohio, (May 8, 1897) 80 Fed. Rep. 811.

This was a suit by a corporation manufacturing wire and nails to restrain employés who had struck for higher wages, and thus forced the company's works to be closed, from interfering with other persons who desired to work when the works were reopened.

It appeared that the defendants had resorted to threats, intimidation, and violence for this purpose, and Sage, D. J., held that an injunction should be issued to restrain them, citing specially the Massachusetts cases of *Sherry* v. *Perkins* and *Vegelahn* v. *Guntner*, and saying that while the defendants might

> "peaceably and quietly persuade complainant's employés to quit work, persuasion with the hooting of a mob and deeds of violence as auxiliaries is not peaceable persuasion."

Nashville, &c., Rwy. Co. v. *MacNiel* (Circuit Court, Mid. Dist. Tenn. Decided August 19, 1897, 82 Fed. Rep. 65, 87).

Here the court issued an injunction to restrain the sale of centennial tickets to the Nashville Exposition in violation of the rules under which they were issued by the railroads, upon the ground that such issue was an interference with the lawful business of the railroads, and that the protection of that business was a proper subject for the granting of an injunction. To the suggestion that this was a novel proposition the court replied that that was of no consequence, that equity jurisdiction was flexible and was to be exercised whenever in the judgment of the court it was necessary, either from private or public considerations, saying:

> "The court may properly take into account the *public bearing of these actions*, and whether the result *will affect the public favorably or injuriously.*"

To the suggestion that public interests could not be protected or taken into account in proceeding by private persons, the court said that the *railway companies in effect represented the public*, and continuing enlarged upon the benefit of the exposition to the public, saying:

> "There is good ground, therefore, for the apprehension that *it is now a vital question whether the exposition shall be the success hoped for, or whether it shall go down in defeat, with state pride humiliated* simply in order that the particular practice complained of may continue. I refer to these public considerations because, as before stated, they are matters which justify appeal to the discretion of the court in determining what action shall be taken. Are the great public purposes of this exposition to be thus put in the balances and weighed against this particular branch of the ticket scalpers' trade?"

The court further said that persons not parties to that suit would be amenable to the injunction *if they obtained knowledge of it.*

Mutual Life Insurance Company of New York v. *Boyle*,

Atty. Gen., et al. (Circuit Court, District of Kansas, decided September 27, 1897), 82 Fed. Rep. 705.

Here the federal court entertained a suit by a New York life insurance company against the attorney-general and superintendent of insurance of the state of Kansas to enjoin them from interfering with the business of the insurance company in that state by refusing to issue to it a certificate to do business therein, and to require the insurance commissioner to issue a certificate authorizing such business, and the court held that as the insurance commissioner was by the terms of the state statute plainly required to issue a certificate to the life insurance company, and as his refusal to do so was an injury to the business of the company, the federal court had power to issue the injunction asked in order to prevent irreparable injury to the business of the company, and issued a perpetual injunction against the superintendent of insurance

> "restraining him from in any manner interfering with the company or its agents in the transaction of the insurance business in the state of Kansas, and *commanding him to issue a license to the company as required by the laws of the state of Kansas*, and restraining all others that might act or be called upon to act by the superintendent of insurance from interfering with said company in the transaction of business in Kansas,"

and also *enjoined the attorney-general of the state* "*from bringing suits in behalf of the state* upon the request of the insurance commissioner against the company or its agents for transacting its business in Kansas."

Swaine et al. v. *Blakemore et al.* (Circuit Court, city of St. Louis), decided November 2, 1897.

This was a suit between laborers. The plaintiffs, six in number, alleged that they were officers of the Local Union, No. 4, of the United Brotherhood of Carpenters and Joiners of America; that the defendants were members of the Carpenters' District Council of St. Louis and vicinity of the

United Brotherhood of Carpenters and Joiners of America; and that the defendants had for the purpose of depriving the plaintiffs and their associates of the means of earning a livelihood in their calling, sought to secure the discharge of the plaintiffs and their associates from their employment, by representing to their employers that the plaintiffs were non-union men, demanding their immediate discharge and threatening that if they were not discharged they, the defendants, would not allow any union men to work upon the job on which the plaintiffs were employed, and would boycott the employer and the work in which he was engaged. They alleged that in consequence of this conduct of the defendants a number of the plaintiffs had been discharged by their employers, and had been refused employment elsewhere solely on account of this conduct of the defendants. Wherefore they said that they were deprived of the means of earning a livelihood, and would suffer irreparable damage if the conduct of the defendants was not restrained by injunction.

The court held that the plaintiffs had a right to an opportunity to earn a livelihood by labor in their "chosen avocation"; that this right was property, and that the conduct of the defendants in preventing the exercise of that right to secure employment and labor was an irreparable injury to the freedom and rights of the plaintiffs, for which there was no adequate remedy at law. The bill was verified upon information and belief, an *ex-parte* injunction was issued upon it restraining the defendants by name

> "and all persons acting in concert with them, or under their direction, orders, or control, from interfering with plaintiffs and their associates (naming them), or any one of them, in the peaceable pursuit of their avocation, and from interfering with or boycotting any employer for whom said plaintiffs, or their associates, or either of them may be working."

A demurrer to the bill was overruled, and upon subsequent information for contempt in violating the injunction, four of

the defendants were adjudged guilty of contempt and each fined $10 and costs.

Hopkins et al. v. *Oxley Stave Co.* (U. S. Circuit Court of Appeals, Eighth Circuit), decided November 8, 1897. 83 Fed. Rep. 912.

This was an appeal from an order by the Circuit Court for the District of Kansas granting a preliminary injunction.

It appeared that the Oxley Company manufactured barrels and casks at Kansas City, and had in use certain machines which lessened the cost of making the same. The defendants, not employés of the company but officers and members of trades unions, notified the company to discontinue the use of these machines, and to compel the company to do so, notified it that the members of all labor organizations throughout the country would be induced not to purchase any commodity which might be packed in the machine-hooped barrels or casks. The court enjoined the defendants against this threatened boycott and

> "from in any way menacing, hindering, or obstructing the company by interfering with its business, or its customers and thus excluding it from the full enjoyment of such patronage or business as it might enjoy or possess independent of such interference."

From this injunction order an appeal was taken, and the Court of Appeals affirmed the order in an opinion delivered by *Thayer*, Circuit Judge, in which *Sanborn*, Circuit Judge, concurred. *Caldwell*, Circuit Judge, the other member of the court, dissented. The reason given by the majority of the court was that the defendants had *combined* to prescribe the manner in which the company should manufacture barrels and casks, and to enforce obedience to their orders by a species of intimidation which was "no less harmful than actual violence, and which usually ends in violence;" saying

> "The fact cannot be overlooked that another object of the conspiracy was *to deprive the public at large* of the benefits to be derived from a labor-saving machine, which seems to have been one of great utility. If a combination to that end is pronounced lawful, it follows that combinations may be organized for preventing the use of harvesters, threshers, steam looms and printing presses, type-setting machines, sewing machines, and a thousand other inventions which have added immeasurably to the productive power of human labor and the comfort and welfare of mankind."

Caldwell, C. J., was of the opinion that the court ought not to interfere in such cases, saying

> "All capital seeks to increase its power by combination, and to that end assumes the form of corporations and trusts. Many of these combinations are on a gigantic scale. They are the employers of the great mass of laborers. . . . The manager is tempted to reduce wages to increase dividends, and the laborers resist reduction and demand living wages. Sometimes the struggle reaches the point of open rupture. When it does the only weapon of defence the laborer can appeal to is the strike, or the boycott, or both. *These weapons they have an undoubted right to use so long as they use them in a peaceable and orderly manner. This is the only lawful limitation upon their use.* That limitation is fundamental and must be observed. It was observed in the case at bar to its fullest extent."

The opinion of Caldwell should be widely read. It is learned, accurate, and convincing.

In commenting upon this decision of the majority, a newspaper of the East said:

> "Such decisions as this are responsible for the outcry that is going up all over the country that the writ of injunction is rapidly becoming an actual instrument of oppression."

Lynch et al. v. *Boston et al.* (Superior Court, Mass. Jan. 25, 1897.)

Here the plaintiffs had a contract with the city of Boston to build a bath house. The contract provided that the contractors should give preference to union labor. A portion of the men employed by them in work under the contract were non-union men. The architects by the direction of the mayor of the city, requested the contractors to discharge the non-union men. This was done at the request of the labor union and, as the mayor claimed, to prevent a strike by the union men and the stopping of the work thereby.

The contractors refused to discharge the non-union men and then the architects by direction of the mayor notified the contractors to discontinue all further work under the contract. This it was claimed could be done under a provision in the contract authorizing the city by the architects to terminate the contract.

The contractors then attempted to go on with the work when the mayor caused the police to forcibly prevent them and their men from entering and completing the building. The contractors then brought a suit in equity against the mayor, the architects, and the superintendent of public buildings, to enjoin them from preventing the contractors from completing the building according to contract.

There was no evidence of irreparable injury or that the defendants were not responsible for any damages which might be recovered against them at law. But the court, Richardson, J., found that the contract had not been terminated and that the contractors had a right to complete its performance and enjoined the defendants from "preventing or hindering the plaintiffs in the performance of the contract for the reason that they do not employ members of the labor unions."[1]

There have, of course, been many other unreported cases during the past few years where the power of injunction

[1] *Boston Daily Advertiser*, Jan. 25, 1898.

and punishment for contempt, has been exercised in a similar manner. Indeed one of the greatest objections to the exercise of the power is that there is in most cases practicably no appeal from the summary action of a single judge. The mischief is done when the injunction issues for it must be obeyed until modified, and as few defendants in this class of cases have the money to carry on expensive litigation, the order of one judge often made *ex parte*, is in most cases practically a final order.

The *obiter dicta* discussion of this matter by the United States Supreme Court in the Debs case has doubtless tended to cause the courts to unduly extend their equity powers in restraint of threatened crime, and in cases of strikes and boycotts.

In that case the court did not stop with the decision of the question before them, which was, as I have before shown, only whether the circuit court *had jurisdiction* to enjoin obstructions to interstate commerce.

Whether the proof in the circuit court showed the existence of such obstructions, whether it was expedient to issue the injunction against their continuance, or whether the injunction issued had the effect to remove the obstructions, were considerations wholly outside of the question before the supreme court, and upon which there was not and could not be any evidence before it. But the court evidently impressed, as all persons must be, with the extraordinary condition of affairs out of which the litigation arose, went beyond the decision of the question before it. The opinion discusses the condition of affairs in Chicago at the time the bill was filed, and finally quotes from the testimony of Debs, one of the defendants, not in the record, not even given in the case in the court below, but given *before a commission* appointed by the president to investigate the Chicago strike, and only stated in the argument of the attorney-general, to the effect that the strike was broken up, not by the army, but simply and solely by the action of the United States

courts in restraining the officers of the labor organizations from discharging their duties. The opinion then assumes *from this testimony alone* that the injunction which was issued did have the effect to restrain the obstruction to interstate commerce and the transmission of the mails, which was set forth in the bill.

In this the opinion not only went beyond the decision of the case, and outside of anything in the record before the court, but beyond and contrary to the facts.

The trouble in Chicago began June 26, by the declaration by the American Railway Union of a boycott of all railroad companies which hauled Pullman or Wagner cars. At midnight the switchmen on the Central Illinois railroad left, and stopped the operation of the railroads from Chicago to New Orleans.

On the 28th of June two thirds of the railroads leading to Chicago stopped operation.

On the 1st of July ten of the twenty-two railroads entering Chicago stopped all attempts to run freight trains, and seven made no attempt to run any trains at all.

Of the 152 passenger trains entering and leaving the Dearborn Street station daily, only twelve came in and ten went out on June 30th. By that time the suburban traffic in Chicago was practically abandoned, and traffic was interfered with on two thirds of the railroads of the United States.

On July 2nd, the city was suffering acute inconvenience from want of ice, food, and coal. At that time, to quote the language of the attorney-general before the supreme court,

> "The interference with interstate commerce was on an immense scale. It included all the twenty-one or two railroads centering in Chicago with their 120,000 miles of track, all whose operations were practically paralyzed. The interference was not sentimental, or brought about by persuasion or cajolery, nor even by threats only. It was

accompanied with the burning of cars, with the derailment of trains, with the destruction of signal towers, and other appliances for the safe operation of trains, with assaults upon passengers and employés by which many were killed and many more wounded, with howling and excited mobs in full occupation of entire districts and terrorizing entire communities. . . . The metropolis of the West, the great centre for the reception of food products and for their distribution North and South and East, was not simply deprived of its trade and subjected to the immense pecuniary loss arising from such deprivation; it was not simply cut off from social and commercial intercourse with the outer world, except through the imperfect media of the telegraph and telephone; but its men, women, and children, numbering more than a million and a quarter of souls, were fast being deprived of the very necessaries of life—of ice and of milk and of coal, and of the thousand and one other articles so essential in these days to comfort if not to existence itself. Except, indeed, that her beseigers were from within, Chicago was very much in the position of a beleaguered city about to be reduced to submission by the slow but sure processes of starvation and famine."[1]

It was the duty of the mayor of Chicago to check the riot long before that time, and as soon as it threatened the good order of the city. This he had neglected to do.

It was the duty of the governor of Illinois to check the riot and suppress this disorder as soon as it threatened the good order and peace of the state, and this he had neglected and refused to do.

It was the duty of the president of the United States to check and suppress the riot when it threatened the peace of the United States, and obstructed interstate commerce and the mails, as it then did. It is little to his credit that he was unwilling to do it except as a marshal enforcing an injunction of a federal court. Imagine Lincoln waiting for an injunction before he used the army of the nation to

[1] Argument attorney-general, *Debs case, pp.* 6, 7.

remove the obstruction of the mails and of the operation of the laws by the rebellion.

It was under these circumstances, when the riot had reached this extended and most dangerous condition, and Chicago was, as the attorney-general said, practically a "beleaguered city," that the government applied to the federal court to restrain certain defendants and all who held a subordinate relation to them and "*all persons whomsoever*," from continuing to disturb the peace and obstruct the mails and interstate commerce by their riotous proceedings, *i. e., to enjoin the riot.*

It was obvious that such an injunction could not be enforced by the officers of the court. It was manifest that nothing could suppress the riot but the exercise of executive power by use of armed troops of the United States. There was no question and there could have been no question in the mind of any one, that to enforce the process of the court *would require the same exercise of executive military power which would be required if there were no order of the court.*

It is plain that the court issued this omnibus injunction against "all persons whomsoever," only that it might be made the basis of a request for the use of federal troops to put down the riot. Under these circumstances it seems almost grotesque to say, as the supreme court did, that "it is to the credit of the government that it submitted the questions arising upon this suit to the peaceful determination of judicial tribunals, and invoked their consideration and judgment as to the measure of its rights and powers and the correlative obligations of those against whom it made complaint," rather than to remove the obstructions to interstate commerce and the mails by the exercise of the executive power.

There was no real judicial determination by the court. It issued its injunction *ex parte*, not only to the defendants named, but to "*all persons whomsoever*," and no amount of legal sophistry can satisfy the mind that the injunction was

anything more than a judicial proclamation to a few persons by name and to all other persons who were disturbing the peace in Chicago, numbering many thousands, *to keep the peace.* The suggestion that by this suit the government "*submitted*" its right to suppress this riot, as an obstruction to interstate commerce and the mails, to the judgment of a single judge, is, under the circumstances, absurd.

Suppose this judge had declined to issue this omnibus injunction, would the government have refrained from performing its plain duty to suppress the riot by the exercise of military power? Suppose upon a motion by any one of the defendants named in the suit, or by any person (for if the injunction bound "all persons whomsoever" it would seem that any person whomsoever might move to dissolve it), the injunction had been dissolved, is it to be supposed that the government would have withdrawn the troops and permitted the mob to continue to disturb the peace and to obstruct interstate commerce and the mails? Of course not. There was no doubt of the power and the duty of the president to suppress the riot and break up its obstructions to interstate commerce and the mails. It required no judicial determination to establish that power, or to justify the president in the discharge of that duty. He knew he had that power. He asserted it in a communication to the governor of Illinois, and those who know the temper of the then executive and his legal adviser, the attorney-general, can have no possible doubt that he would have performed that duty by the use of troops independent of and even, if necessary, contrary to the decision of any single federal judge, or of any number of federal judges.

Never before in the history of the United States had it been deemed necessary or expedient for the government to go into its own courts to obtain civil process of injunction against rioters to justify it in putting down a riot, which interfered with a subject matter over which the federal government had exclusive control. It is, to say the

least, most unfortunate that it was done in this case. An examination of the facts shows that the application to the court and the order of the court were useless, and only brought the court and its process into contempt by the people. The mob treated the injunctions with contempt, and it was only the exercise by the president of the power which he unquestionably had to suppress the riot, by the exercise of military power, which did suppress it.

On the same page of the report of the strike commission from which the quotation of the attorney-general adopted by the court is made it appears that the first proceedings against Debs were indictments for violation of the United States statutes punishing obstruction of the mails, conspiracy to commit offences against the United States, conspiracy in restraint of trade or commerce among the states, and against conspiracy to injure or oppress, threaten or intimidate citizens in the free exercise and enjoyment of their rights and privileges under the constitution and laws of the United States.[1] And upon these indictments Debs and his official associates were all arrested and placed under bail of $10,000 on the *seventh day of July*, while it was not until the *seventeenth day of July* that an attachment was issued against them for an alleged violation of the injunction of the federal court.[2] In this connection it is also to be observed that while the strike commission, appointed by the president July 26, 1894, under section 6, chapter 1,063, U. S. Laws, 1888, began its sessions in Chicago on the fifteenth of August, 1894, and examined one hundred and seven witnesses, including all the officers of the American Railway Union, no witness except Debs declared that the injunction of the court ended the strike, nor did the strike commission find that the process of the federal court had any effect whatever in quelling the riots.

[1] See section 3,995, U. S. Revised Statutes; section 5,440, U. S. Revised Statutes; section 5,508, U. S. Revised Statutes; chapter 647, U. S. Laws, 1890.

[2] Report U. S. strike commission, 1894, pp. 18, 143.

Indeed, the testimony of Debs quoted, when taken in connection with the portion of his testimony immediately preceding it, fairly shows that when he said the strike was put down by his arrest upon process from the United States courts he meant not so much the arrest upon process for contempt, as the original arrest upon indictment.

It is really, however, of very little consequence what he meant, for he was obviously magnifying his own importance by attempting to show that when by arrest he was removed from control the strikers had no head and were compelled to disperse.

Whatever Debs may have said before the strike commission, for the obvious purpose of showing the personal importance of himself and his associates as officers of the labor organizations, as to the effect of the injunction and the commitment of himself and the other officers upon process for contempt, the fact was that the riots which grew out of the strike in Chicago and San Francisco and other portions of the country in July, 1894, were not suppressed or put down by the injunctions of the federal courts, but by indictments found by special grand juries and by the presence of the state and federal soldiers.

It is true that the grand jury as summoned in San Francisco, June 29, 1894, was at first disinclined to find indictments against the strikers, but they did on *July 2* find four bills against a large number of them.[1]

Suits in equity by the United States were brought there as in Chicago and injunctions issued and served, but the service of the injunctions produced no effect. On the contrary, the marshals who attempted to serve them were forcibly assaulted in San Francisco, and it was not until federal troops arrived in San Francisco and Sacramento, days after the injunctions were served, that trains were moved, and obstructions to interstate commerce and transportation of the mails removed.

[1]Appendix to report of attorney-general for 1896, pp. 18, 20.

In Colorado the bill by the government for an injunction was filed and injunction issued and served on July 7. July 11 the United States attorney notified the attorney-general that "*deputy marshals are captured and disarmed, process of court torn into shreds*, and mail trains detained."[1]

In Idaho injunction was issued by the federal courts in the Northern Pacific Receivership suit, and federal marshals attempted under that process to prevent interference with the property in the hands of the receivers of the court. But it was unavailing, and the federal judge telegraphed the attorney-general that

> "To attempt to run trains by marshals alone is a long, uncertain struggle with a bloody ending. Upon my information I state that marshals alone cannot control the situation and operate trains, and ask that troops be ordered to go with all mail trains."[2]

Notwithstanding the service of process from the federal courts the riot went on until the ninth of July, days after the court had issued its order, when Judge Beatty telegraphed to Washington, saying:

> "I recommend that United States troops be sent. *Only they are feared by the ruffians.* Their presence will save life and property."[3]

In Chicago the bill of the government was filed, and injunction issued and served *July 2*, but the persons sought to be enjoined paid no heed to the injunction. The United States marshal telegraphed the attorney-general, saying:

> "*I have read the order of court to rioters here, and they simply hoot at it; pay no attention to it.* In my judgment it is impossible to move trains here without having the 15th Infantry from Fort Sheridan ordered here at once."[4]

The special counsel of the United States in Chicago also

[1] Appendix report attorney-general, 1896, pp. 42, 44.
[2] Telegram, Beatty, U. S. Judge, Appendix Atty. Gen'l Rep. 1896, p. 51.
[3] Ibid, p. 53.
[4] Appendix Rep. Atty. Gen'l, 1896, p. 62.

notified the attorney-general on the same day advising the calling of a special grand jury, and saying:

> "The very fact that the government has called a grand jury for the purpose of investigating these offences, and the return of indictments, which in my opinion are sure to follow, will *have a greater restraining effect upon Debs and his followers than our proceedings by injunction.*"[1]

On July 3, the United States marshal again notified the attorney-general that he had read the injunction to the mob and commanded them to disperse, but he said the reading of the writ met with no response except "jeers and hoots."

> "I am unable to disperse the mob, clear the tracks, or arrest the men who were engaged in the acts named, and believe that no force less than the regular troops of the United States army can procure the passage of the mail trains, or enforce the orders of the court."

On the same day the judge of the federal court and the United States attorneys certified to the attorney-general the existence of this condition of affairs, and that an "emergency exists for the immediate presence of the United States troops."[2]

The president then ordered troops to Chicago.

On the same day the district attorney notified the attorney-general that

> "the situation has not improved at all, and as a matter of fact we are making no further attempt to serve further papers or make arrests until the marshal has the support of the military department."

Also that an order had been entered by the federal court for a special grand jury.

On the Fourth of July, the attorney-general telegraphed the United States attorney,

[1] Ibid, p. 64.
[2] Ibid, p. 66.

"Do not lose a moment in summoning special session of grand jury."

and a jury was summoned on July 5.

July 6, the United States attorney notified the attorney-general that the mob had *fired upon the marshals* and that there was no improvement in the conditions. The mob was practically in possession of the stock-yards and railroad tracks.

On the same day the mayor of Chicago and the sheriff called upon the governor for five regiments of state troops. Three men were killed that morning.

July 3, the first regiment of federal troops arrived, and July 5, a collision took place between the federal troops and the rioters. Gatling guns were placed in position, and the troops charged upon the mob, but without effect.

On July 5, the buildings of the World's fair were set on fire, and during the night of July 6, the mob held full control of the entire southern suburbs of Chicago, burned over a thousand cars as well as buildings, signal towers, and storehouses, inflicting a loss estimated at about three million dollars.

At that time five thousand state troops were massed in the city, and twelve hundred federal troops were also in the city.

On the morning of the seventh, the Illinois regiments moved upon the mob in the suburbs, occupied the railway yards and approaches to the stock-yards, and in a collision with the mob fired and then charged with bayonet wounding about twenty rioters, but they were compelled to retreat to the cars where they were besieged by the mob until reenforcements arrived.

It was then that General Miles with the federal soldiers and General Wheeler commanding the Illinois troops agreed with the mayor upon a plan of operations, established an armed camp from which reënforcements could be despatched in any direction, and made it known throughout the city

that orders had been given to fire upon the mob, if necessary. The regular troops undertook to protect the government buildings and the railway stations. The deputy marshals protected the stock-yards and the railway stations on the south. Altogether at that time there were ten thousand armed men under the command of General Miles of the federal army and General Wheeler of the Illinois troops.

On the night of the eighth of July *the president issued his proclamation putting Chicago and other disturbed districts under martial law*, and at the same time ordered eighteen hundred additional federal troops to Fort Sheridan, within reach of General Miles at Chicago. Then and only then trains began to move, although the injunctions of the court had been issued and *served for more than a week.*

Then a difficulty arose at Hammond in Indiana, just over the Illinois line, and on the eighth the governors of the two states directed their respective forces to operate as one body irrespective of frontiers; and at the same time the mob attacked a train approaching Hammond from Indianapolis carrying a body of federal troops, who replied with musketry and with a bayonet charge, killing four persons and wounding twelve. But it was not until heavy reënforcements of state troops had arrived, and after many collisions with the mob that the blockade of commerce at Hammond was removed.

If any further proof were necessary that the presence of the federal troops and state troops and the indictments were what really terminated the riot in Chicago, it is found in the letter of the special United States attorney to the attorney-general on July 13, where he says:

> "The injunction of the courts *was willfully violated every day until the indictments were returned*, and I believe that the leaders fear the grand jury more than the presence of troops."

And again, writing on July 14, he says:

> "As I telegraphed you the strike is now practically over. In

> my opinion the calling of the grand jury, the charge of the court, the *indictment and arrest* of Debs and others, and the continual sessions of the grand jury exercised a most healthful influence over the leaders of all other labor organizations, and therefore such leaders have refused to order a strike."

Continuing, he said, that he advised calling attention of the court to the violation of its injunctions, and further indictments of Debs and the other officers of the Railway Union, to which the attorney-general replied that he entirely approved that method of procedure.

July 17, information was filed against Debs and others for violation of injunction, and on the 18th they were arrested and committed to jail in default of bail.[1]

And yet, notwithstanding this, on July 19, the district attorney notified the attorney-general that although the marshal had twelve hundred deputies they were in his opinion insufficient to preserve order if the federal troops were removed, and on the same day the United States judge notified the attorney-general that he was "satisfied that the continued presence in Chicago of the federal troops is of great importance and probably necessary to ensure operations of trains."[1]

July 26, the contempt proceedings against Debs and others were continued to September 5.[2] And on the same day the special district attorney notified the attorney-general that the indictments could not be tried until the last of October, and that as indictments were pending against all of the persons charged with contempt, it was to his mind a serious question whether proof should be submitted in support of the charge of violating the injunction before trial under the indictments, and also said that he was inclined to the opinion that if the contempt proceedings should then be heard, and the court should hold that the defendants were guilty of violating its orders and subject to punishment, the

[1] Appendix Rep. Atty. Gen'l, 1896, p. 90.
[2] Ibid, p. 93.

execution of the order would be stayed until the trial under the indictment.[1]

This is obviously what ought to have been done, but as a matter of fact the contempt proceedings were actually heard in October and decided in December and the indictments were never tried.

In Minnesota indictments were found against those who obstructed interstate commerce and the transmission of the mails, and order was preserved without calling for troops, by the indictment and arrest of those who had violated the law, but the indictments were never tried.

In Missouri bills in equity were filed by the government in the circuit court, and criminal informations were filed against the leaders of the Railway Union. No contempt proceedings were instituted, and upon the restoration of order the criminal informations were not tried.[2]

In New Mexico interstate commerce and the transmission of the mails was interrupted by large bodies of strikers, who disregarded the injunctions issued by the federal courts, and the marshal and judge of the court notified the attorney-general that it was absolutely necessary that federal troops should be sent, and troops were ordered as requested. Criminal proceedings were begun and contempt proceedings were instituted, but it was not until arrests were made upon criminal process and after the arrival of the troops that the obstructions to commerce and the transmission of the mails were removed. Informations for contempt against a large number of persons were tried, and four only were convicted and sentenced to sixty days. Indictments were not procured. The district attorney reported to the attorney-general that owing to the sympathy of the community with the strikers it was doubtful whether indictments could be procured, or if procured whether convictions could be obtained.[3]

[1] Appendix Rep. Atty. Gen'l, 1896, p. 95.
[2] Ibid, p. 140.
[3] Appendix Rep. Atty. Gen'l, 1896, pp. 164, 165.

Disturbances arose at Cincinnati and Toledo in the state of Ohio, and a bill was filed by the government similar to that filed in Chicago. Injunction was issued and served upon many persons and posted for public information. No indictments appear to have been found, but one Phelan, agent of the Railway Union, was arrested for contempt of the injunction order, and upon being found guilty sentenced to imprisonment.[1]

In Utah serious obstructions to commerce and the mails arose at Ogden. A bill was brought by the government in the federal court and injunction issued and served, and warrants were also issued for the arrest of persons under the federal statutes. A special grand jury was ordered. The United States attorney notified the attorney-general, however, that when the marshal served the court injunction he was "met with jeers and threats of defiance." He says:

> "I was amongst the strikers. *I asked them whether they would obey the injunction. They declare they will not.* An attempt to make an arrest would precipitate a riot."[2]

Two days later the district attorney and marshal notified the attorney-general that "nothing short of the United States military is sufficient to cope with the situation." And this was approved by the acting governor of Utah and by the associate justice.

July 5, injunctions were further served by a force of about fifty deputy marshals, and they reported that the strikers "*simply hooted and paid no attention whatever to it.*"

July 9, the grand jury was in session and found indictments.

July 16, the district attorney reported to the attorney-general that the temporary restraining order, which was first obtained by him from the court under the interstate commerce act, when read by the marshal to the strikers was *met with derision and cries of "Rats,"* etc.; that he therefore

[1] Appendix Rep. Atty. Gen'l, 1896, pp, 173, 177.
[2] Ibid., p. 194.

"took the conservative side and waited until the appearance of the troops on Sunday morning, July 8, which had a quieting effect. And in the meantime indictments had been returned by the grand jury."

Continuing he said:

"*The action of the grand jury has had a wonderfully happy effect and things are proceeding now* according to the regular course of law."[1]

The appendix to the attorney-general's report for 1896, from which these facts are mainly obtained, contains the telegraphic and other correspondence between the department of justice and others with regard to the labor disturbances of 1894, and was printed in response to a concurrent resolution of congress, passed in January, 1897. It contains the most, and probably the only, reliable information as to what did in fact suppress the riots and remove the obstruction to interstate commerce and the transmission of the mails.

An examination of it demonstrates beyond all question that it was not the arrest of Debs and a few of his confederates for contempt of court that suppressed these extensive riots and restored peace in Chicago and other places. It was not the injunction of the federal courts that put down the riots and removed obstructions to commerce and the transmission of the mails, but indictment by grand juries, arrest upon criminal process, and especially the presence of federal and state troops to the number of more than ten thousand, and the proclamation of the president proclaiming martial law in Chicago, that quelled the riots and removed the obstructions to interstate commerce and the transmission of the mails.

It is true that the federal troops went only in answer to a request from the United States district attorney and the federal courts ostensibly to aid the marshals in enforcing the

[1]Appendix Rep. Atty. Gen'l, 1896, p. 196.

injunctions of the courts. But the effect would have been precisely the same if they had been sent without that request, as they lawfully might and ought to have been. The president, as the Supreme Court held in the Debs case, had unquestioned authority to send the entire federal army to Chicago, or elsewhere, to suppress any combination, disorder, or riot, which interfered with interstate commerce and the transmission of the mails, without request from any district attorney or federal judge; and if he had done so the effect upon the rioters would have been precisely the same that it was when the troops were sent in answer to such request.

It was not the power of the federal courts to imprison for sixty or ninety days for violation of its injunction that removed these obstructions to commerce: It was the power of the executive to use military force even to the destruction of life, which accomplished the result. So far as the courts were concerned, the only result was that their processes were jeered at, their "omnibus injunctions" treated as mere judicial riot acts and disregarded, and the courts made the subject of criticism by many of the best and most law-abiding citizens.

The conduct of the courts in the cases which I have stated, and especially their conduct in Northern Pacific, Ann Arbor, and Chicago cases, caused discussion and criticism which has weakened the confidence of the people not only in the federal but in the state courts. It has also caused most ill-advised and mischievous legislative action.

On the first day of the next session of congress a bill was introduced in the senate providing:

> "That in any case where a writ of injunction issues from a court of the United States, or a judge thereof, to enjoin the commission of an act which is, at common law or by statute, a criminal offense, and where, afterwards, in such case, it is charged that the party or parties defendant has or have committed, or have attempted to commit, or have

aided and abetted or encouraged or instigated other persons, or has or have conspired with other persons or has or have conspired with other persons to commit such act or offense, and where the said party or parties defendant is or are brought before said court or judge to answer the charge in proceedings for contempt, and where the charge is denied by the defendant or defendants, on request, a jury, shall be called to determine the fact."[1]

Other bills of a similar nature were afterwards introduced. See especially Senate Bill 418, entitled "A bill concerning the trial and punishment of contempts of the United States Courts."

These were referred to the Judiciary Committee, consisting of Senators George F. Hoar of Massachusetts, chairman, and Henry M. Teller, of Colorado; Orville H. Platt, of Connecticut; John H. Mitchell, of Oregon; Cushman K. Davis, of Minnesota; Clarence D. Clark, of Wyoming; John M. Thurston, of Nebraska; James L. Pugh, of Alabama; James Z. George, of Mississippi; William F. Vilas, of Wisconsin; David B. Hill, of New York; William Lindsey, of Kentucky; and John W. Daniel, of Virginia.

The senate also adopted a resolution:

"That the Judiciary Committee is hereby directed to investigate the law upon the whole subject of 'contempts of court,' as enforced by the federal courts, and to report to the senate whether any additional legislation is necessary for the protection of the rights of citizens; and if so, to report such legislation."

April 30th, 1896, this committee unanimously reported the following bill:

"A BILL in relation to contempts of court."

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

"Contempts of court are divided into two classes, direct

[1] First session 54th Congress, Senate Bill, 237.

and indirect, and shall be proceeded against only as hereinafter prescribed.

"SEC. 2. That contempts committed during the sitting of the court, or of a judge at chambers, in its or his presence or so near thereto as to obstruct the administration of justice, are direct contempts. *All others are indirect contempts.*

"SEC. 3. That a direct contempt may be punished summarily without written accusation against the person arraigned, but if the court shall adjudge him guilty thereof a judgment shall be entered of record in which shall be specified the conduct constituting such contempt, with a statement of whatever defense or extenuation the accused offered thereto and the sentence of the court thereon.

"SEC. 4. That upon the return of an officer on process or an affidavit duly filed, showing any person guilty of indirect contempt, a writ of attachment or other lawful process may issue, and such persons be arrested and brought before the court; and thereupon a written accusation, setting forth succinctly and clearly the facts alleged to constitute such contempt, shall be filed and the accused required to answer the same, by an order which shall fix the time therefor, and also the time and place for hearing the matter; and the court may, on proper showing, extend the time so as to give the accused a reasonable opportunity to purge himself of such contempt. After the answer of the accused, or if he refuse or fail to answer, the court may proceed at the time so fixed to hear and determine such accusation upon such testimony as shall be produced. If the accused answer, the trial shall proceed upon testimony produced as in criminal cases, and the accused shall be entitled to be confronted with the witnesses against him; but such trial shall be by the court, or, *in its discretion*, upon application of the accused, a trial by jury may be had as in any criminal case. If the accused be found guilty, judgment shall be entered accordingly, prescribing the punishment.

"SEC. 5. That the testimony taken on the trial of any accusation of indirect contempt may be preserved by bill of exceptions, and any judgment of conviction therefor

may be reviewed upon direct appeal to or by writ of error from the supreme court, and affirmed, reversed, or modified, as justice may require. Upon allowance of an appeal or writ of error execution of the judgment shall be stayed, upon the giving of such bond as may be required by the court or a judge thereof, or by any justice of the supreme court.

"SEC. 6. That the provisions of this act shall apply to all proceedings for contempt in all courts of the United States except the supreme court; but this act shall not affect any proceedings for contempt pending at the time of the passage thereof."[1]

June 10th, 1896, the senate amended the bill so as to provide that in any case of indirect contempt the person charged should have an absolute right of trial by jury, and then passed the bill as thus amended without a dissenting vote. The only opposition to this was by that sound and conservative lawyer, Mr. Platt, of Connecticut, but even he admitted that "there should be some bill relating to the regulations of proceedings in contempt cases passed," and "not objecting to the principle which is contended for in the bill," only claimed that it made "no distinction between contempts, which are merely the disobedience by a witness or a juror of the command of a court, and the contempt which is the disobedience of such orders as were issued in the *Ricks*[2] and *Debs cases*."

For these reasons, and because the subject was most important, and the bill "revolutionized the entire practice in equity proceedings," he only asked that it be postponed for a more full consideration than it was then possible to have in the closing hours of the session.

But the senate refused even this, and so far as it could by its action made this most mischievous bill the law of the United States[3]

[1] Senate Bill, No. 2984.

[2] Obviously meaning by Judge Ricks in the *Ann Arbor cases*.

[3] Cong. Rec., June 10, 1896, *pp.* 6998, 7008.

The federal statute on this subject is, and has been for more than a century, substantially as contained in the Judiciary-Act of the United States (Ch. 12, Rev. Stats.), Section 725 of which provides that the courts of the United States

> "shall have power to punish by fine or imprisonment at the discretion of the court contempts of their authority; provided that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or *by any party, juror, witness, or other person, to any lawful writ, process, order,* rule, decree, or command of the said courts."[1]

This is only declaratory of the common law.

But this bill thus passed by the senate gives a jury trial with right to go to the supreme court upon error or appeal in all cases of

> "misbehavior of any of the *officers* of said *courts* in their official transactions, and the *disobedience* or resistance by any such *officer*, or by any *party*, *juror*, *witness*, or *other person*, *to any lawful writ*, *process*, *order*, *rule*, *decree*, *or command of the said courts.*"[2]

It is almost impossible to conceive of a court which can not compel the attendance of parties and witnesses, and regulate the official conduct of its own officers without a jury trial, with a right to go to another court on questions of law. And yet this senate bill classes all these as "indirect contempts," in which a jury trial is given and exception allowed to the supreme court.

[1] Section 4975 gives to the district court in bankruptcy the same power to punish disobedience of orders.

Section 5104 gives specific power to punish refusal by the bankrupt to perform orders of the bankruptcy court by proceedings for contempt.

And the power is by section 4104 recognized in consular courts.

[2] The italics are mine.

Congress had only recently given much needed relief to the supreme court by creating a circuit court of appeals with final jurisdiction in most civil cases, regardless of the amount involved, and to which all questions of law arising in all criminal cases in the circuit and district courts, except cases of capital or otherwise infamous crime, must go before they can be taken to the supreme court. And yet this bill gives an absolute right to any person found guilty of any indirect contempt, no matter how unimportant, in any federal court to go directly to the supreme court. How much power does this leave in the courts to enforce the attendance of witnesses and jurors, or to enforce their orders in equity?

As Senator Platt well said:

> "The trouble is that a contention has arisen in this country over an extreme exercise of this authority to punish for contempt, about which *there is a very intense feeling, and because of this senators are ready to strike down the whole equity jurisprudence of the country.*"

This bill does even more than this. It practically takes away from all the federal courts, law as well as equity, all power to do more than preserve order in the court-room and try cases with such jurors and witnesses as choose to attend.

That such a bill should have passed the senate without even a roll-call is a most striking condemnation of the conduct of the federal courts in the issue of "omnibus injunctions" against large bodies of men, and "all persons whomsoever," not in the administration of justice between party and party, which is the only function of the judiciary, but really only to preserve the peace.

In the house of representatives this bill was referred to the judiciary committee, consisting of D. B. Henderson, of Iowa, chairman, and Representatives George W. Ray, of New York; Case Broderick, of Kansas; Thomas Updegraff, of Iowa; Frederick H. Gillett, of Massachusetts; Luther M. Strong, of Ohio; Henry M. Baker, of New Hampshire;

James A. Connolly, of Illinois; Charles G. Burton, of Missouri; Foster V. Brown, of Tennessee; John W. Lewis, of Kentucky; David B. Culberson, of Texas; Charles J. Boatner, of Louisiana; James E. Washington, of Tennessee; Joseph W. Bailey, of Texas; William L. Terry, of Arkansas; and D. A. De Armond, of Missouri.

January 8, 1897, a majority of the committee reported the bill with an amendment striking out all after the enacting clause and inserting the following:

"SECTION 1. Contempts of court are divided into two classes, direct and indirect, and shall be proceeded against only as hereinafter prescribed.

"SEC. 2. That contempts committed during the sitting of the court or of a judge at chambers, in its or his presence or so near thereto as to obstruct the administration of justice, or by neglecting or refusing to obey the mandate of any lawful subpœna to attend any court or before a judge or commissioner and testify as a witness or produce books, documents, or records, or by neglecting or refusing to obey the mandates of a lawful summons or subpœna to attend and serve as a juror in any court or authorized proceeding, are direct contempts. All other are indirect contempts.

"SEC. 3. That a direct contempt may be punished summarily without written accusation against the person arraigned, but if the court or judge at chambers shall adjudge him guilty thereof a judgment shall be entered of record in which shall be specified the conduct constituting such contempt, with a statement of whatever defense or extenuation the accused offered thereto and the sentence of the court thereon; but when the alleged contempt consists in neglecting or refusing to obey the mandates of a subpœna or summons to attend as a witness and give evidence or produce books, papers, or documents, or to attend as a juror, due proof of the lawful service of such subpœna or summons shall first be filed and the contumacious witness or juror allowed to file written proofs by affidavit denying such service or giving excuses for the neglect or failure to obey such mandates, and thereupon the court may proceed to a hearing of the alleged contempt.

"SEC. 4. That upon the return of an officer on process or an affidavit duly filed, showing any person guilty of indirect contempt, a writ of attachment or other lawful process may issue and such person be arrested and brought before the court or judge at chambers; and thereupon a written accusation setting forth succinctly and clearly the facts alleged to constitute such contempt shall be filed and the accused required to answer the same, by an order which shall fix the time therefor, and also the time and place for hearing the matter; and the court or judge at chambers may, on proper showing, extend the time so as to give the accused a reasonable opportunity to purge himself of such contempt. After the answer of the accused, or if he refuse or fail to answer, the court or judge at chambers may proceed at the time so fixed to hear and determine such accusation upon such testimony as shall be produced. If the accused answer the trial shall proceed upon testimony produced as in criminal cases, and the accused shall be entitled to be confronted with the witnesses against him; but if a trial by jury is not demanded, such trial shall be by the court without the intervention of a jury if the alleged contempt consists in the violation of an order or process of the court, or by a judge at chambers in case the alleged contempt consists in the violation of an order or lawful process granted by a judge at chambers, and upon application of the accused, a trial by jury shall be had as in any criminal case. In case an application is made for a trial by jury and the alleged offender is entitled thereto under the provisions of this act, the court or judge may impanel a jury for the trial of the question from the jurors then in attendance, or send the case to a term of the court for trial at a future day, or if no jury is in attendance the court or judge at chambers, as the case may be, may cause a sufficient number of jurors to be selected and summoned as provided by law to attend at the time and place fixed for the trial of such alleged contempt, from which panel of jurors a jury for the trial of the case shall be selected in the manner jurors are selected for the trial of misdemeanors, and the plaintiff and defendant in the proceeding shall each be entitled to three peremptory challenges, and the trial shall then proceed as in case of misdemeanor; provided, however, that in each case interrogatories

shall be framed by the judge presiding at the trial, which shall embrace the questions of facts material to the inquiry, and be submitted to the jury, to be by it answered in writing; and to each interrogatory the jury shall separately answer in writing, over their signatures, and in case the jury shall answer any interrogatory in the affirmative the fact therein brought in question shall be deemed established. On the findings of the jury in answer to such interrogatories the court or judge shall proceed to pronounce judgment in accordance therewith according to law. If the accused be adjudged guilty judgment shall be entered accordingly, prescribing the punishment.

"SEC. 5. That the testimony taken on the trial of any accusation of indirect contempt may be preserved by bill of exceptions, and any judgment of conviction therefor may be reviewed upon direct appeal to or by writ of error from the Supreme Court, and affirmed, reversed, or modified as justice may require. Upon allowance of an appeal or writ of error execution of the judgment shall be stayed upon the giving of such bond as may be required by the court or a judge thereof, or by any justice of the Supreme Court.

"SEC. 6. That the provisions of this act shall apply to all proceedings for contempt in all courts of the United States except the Supreme Court; but this act shall not affect any proceedings for contempt pending at the time of the passage thereof."

The amendment, it will be seen, puts the refusal to obey a subpœna to attend as a *witness* or a summons to attend as a *juror* in the list of direct contempts, but *leaves all other contempts as "indirect,"* upon charges of which an absolute right of jury trial with the right to writ of error or appeal to the Supreme Court is secured.

The bill even in this form equally condemns the conduct of the courts, for in every one of the cases in which they issued injunctions, which I have before stated, a person charged with violation of them would have been entitled to a jury trial under it.

The defendants in the Northern Pacific case, in the Ann

Arbor case, and Debs and his associates in the Chicago case would under this bill have had a jury trial, and error or appeal to the Supreme Court. Was this because the senate or the judiciary committee of the house approved the conduct of these defendants? By no means; they doubtless condemned that conduct as fully and unqualifiedly as it ought to be and is condemned by every right-minded and law-abiding person. But they also felt that if the courts had power by this *ex-parte* issue of injunctions thus to create offences and then to punish such offences at discretion without a jury trial, that power ought to be taken away.

And if the courts are to use this power as they have used it by the issue of "omnibus injunctions" to "all persons whomsoever," practically for the purpose of keeping the peace, and to enable the judges to punish by summary trial without a jury conduct which is punishable by indictment under the criminal law, I believe all right-minded and thoughtful persons will think the same.

In Kansas such legislation was enacted. March 9, 1897, the legislature of Kansas passed

> "AN ACT to establish trial by jury in cases of contempt of court, and restricting the power of judges and courts in contempt proceedings.
>
> "*Be it enacted by the Legislature of the State of Kansas:*
>
> "SECTION 1. That contempts of court are divided into two classes, direct and indirect, and shall be proceeded against only as hereinafter prescribed.
>
> "SEC. 2. That contempts committed during the sitting of the court or of a judge at chambers, in its or his presence, are direct contempts.
>
> "SEC. 3. That a direct contempt may be punished summarily without written accusation against the person arraigned, but if the court shall adjudge him guilty thereof a judgment shall be entered of record in which shall be specified the conduct constituting such contempt, with a statement of whatever defense or extenuation the accused offered thereto and the sentence of the court thereon.

"SEC. 4. That upon the return of an officer on process or an affidavit duly filed, showing any person guilty of indirect contempt a writ of attachment or other lawful process may issue and such person be arrested and brought before the court; and thereupon a written accusation setting forth succinctly and clearly the facts alleged to constitute such contempt shall be filed and the accused required to answer the same, by an order which shall fix the time therefor, and also the time and place of hearing the matter; and the court shall on proper showing, extend the time so as to give the accused a reasonable opportunity to purge himself of such contempt. After the answer of the accused, or if he refuse or fail to answer, the court may proceed at the time so fixed to hear and determine such accusation upon such testimony as shall be produced. If the accused answers the trial shall proceed upon testimony produced as in criminal cases, and the accused shall be entitled to be confronted with the witnesses against him; but such trial shall be by the court, or upon application of the accused a trial by the jury shall be had as in any criminal case. If the accused shall be found guilty judgment shall be entered accordingly prescribing the punishment.

"SEC. 5. That the testimony taken on the trial of any accusation of contempt shall be preserved, and any judgment of conviction therefor may be reviewed upon the direct appeal to or by writ of error from the Supreme Court, and affirmed, reversed, or modified as justice may require. Upon an allowance of appeal or writ of error execution of the judgment shall be stayed upon the giving of such bond as shall be required by the court, or a judge thereof, or by any justice of the Supreme Court.

"SEC. 6. That the provisions of this act shall apply to all proceedings for contempt in all courts of Kansas; but this act shall not affect any proceedings for contempt pending at the time of the passage thereof.

"SEC. 7. This act shall take effect and be in force after its publication in the statute book.

"Approved March 9, 1897."

(Laws of Kansas, 1897, chap. 106, p. 205.)

Many of the opinions in these cases which I have stated remind one of the practice of the Court of Star Chamber. This court, the oldest in England, always exercised power to preserve the peace by orders which were equivalent to the modern injunction. Originally a committee of the Privy Council, it was by an act passed in the third year of Henry VII.[1] given new powers, or, as was claimed by its members, its powers were recognized and confirmed. This act recited that

> "by undue dominance of sheriffs in making panels and other undue returns, by taking of money by juries, *by great riots and unlawful assemblies*, the policy and good rule of this realm is almost subdued,"

and provided that the chancellor, treasurer, keeper of the privy seal, or two of them, calling to them a bishop and a temporary lord of the council and two justices, might inquire into charges of such offences upon bill or information put to the chancellor, and empowered this tribunal to call before them the persons accused, take evidence and

> "punish them after their demerits and the effect of statutes thereof made in like manner and form as they should and ought to be punished *as if they were thereof convicted after the due order of the law.*"[2]

The Court of Chancery at an early period of its history also interfered in similar matters. In the reign of Henry V. bills for assaults and other matters cognizable at common law were brought in chancery, the plaintiff making the allegation "that he was too poor to sue at common law, and the defendant was strong and abounding in riches."

In the reign of Richard II. the chancellor exercised authority to repress disorder, and to give a civil remedy in

[1] Henry VII., chapter 1.
[2] The Institutions of the English Government, Cox, 235, 454. Reeves's History of English Law (Finlason ed.), vol. 3, p. 153.

cases of violence and outrage, and also entertained bills founded upon breaches of the peace.

Spence, Equitable Jurisdiction, vol. 1, 342, *et seq.*

In some cases the Court of Chancery ordered that petitioners in that court might proceed in the Star Chamber for matters criminal in their nature.

Spence, vol. 1, pp. 3, 50, 51.

The exercise of this power, however, by the Court of Chancery was soon abandoned, and its exercise by the Court of Star Chamber destroyed that court.

When the federal constitution was framed the objection to giving the judges a share with the executive in the revision of acts of the legislature (*i. e.*, the qualified veto power) was that it would "make statesmen of the judges."[1]

It was a sound and wise objection, and prevailed. The public interests are not in the care and keeping of the judiciary, and they should have as little as possible to do with questions of public policy and statesmanship.

But many of the judges now seem to desire to have as much as possible to do with statesmanship and public policy. They boldly bestride the unruly horse of public policy and ride rampant over the whole field of government. Their so-called opinions, really political and economic essays, recall the observations of Clarendon upon the judges of the Court of Star Chamber, that when the people

> "saw in a court of law (that law that gave them title and possession of all that they had) apothegms of state urged as elements of law, judges as sharp-sighted as the secretaries of state, and in the mysteries of state; judgments of law grounded upon matters of fact of which there was no inquiry or proof, . . they had no reason to hope that that doctrine or the preachers of it would be content within any bounds."[2]

[1] Madison's Journal Const. Convention (Scott's ed.), p. 400.
[2] Clarendon's History of the Rebellion, vol. 1, p. 99.

Different causes are assigned for this growing tendency of the courts to extend their equity powers. One is that the judges are not as able as formerly, that a less capable class of men are being placed upon the bench, and that they do not wisely exercise their powers. It is true that the increase in professional receipts, and in the cost of living, with no increase in judicial salaries, makes it a pecuniary sacrifice for competent lawyers to take judicial positions. Perhaps more able men would be secured if the salaries were increased to more nearly correspond with the average professional income of lawyers competent to be judges.

But this is doubtful, and I do not think the standard of judicial ability would be raised by higher salaries. The men at the bar who earn large incomes are not as a rule well adapted to judicial duty. The ablest men on the bench are the ones who have most exceeded their powers in these matters and able men are the most likely to exercise arbitrary power, if they have it.

The cause is deeper than the mere *personnel* of the judges, and is to be found in the growing distrust of trial by jury.

All the "Chicago strike cases" by the government were accompanied by indictments of the defendants for doing the very things which the equity courts enjoined them not to do. And yet the government never tried one of the indictments to a jury, the excuse being that it would be deemed persecution to try men for a crime when they had been punished for the same thing in an equity court by imprisonment for contempt.

But in many cases indictments were found against men who were not punished for contempt, and yet these indictments were not tried. The real reason for this undoubtedly was that it was believed juries would not convict or that the riots having been put down, and peace restored by the use of troops, it was unwise to try to convict the strikers.

In this matter the legislature has itself not been without blame. In cases of liquor nuisances, when it was found

that juries did not convict, the legislature sought to repress the nuisances by extending the equity powers of the courts so that single judges sitting in equity could do what it was conceived juries ought to have done.

In 1882, the attempt was made in Kansas, upon information by the county attorney of Shawnee county in equity, to enjoin an unlicensed liquor saloon as a public nuisance. The court found that the saloon was unlicensed, was used for violation of the law by the sale of intoxicating liquor, and held that

> "every place where a public statute is openly, publicly, repeatedly, continuously, persistently, and intentionally violated is a public nuisance."

Also that independent of any statute such a saloon ought to be considered as a public nuisance, but it held that such a nuisance could not be restrained by injunction in equity. In the opinion the court said

> "It would seem that one of the main objects of the prosecution in instituting this proceeding in a court of equity in contradistinction to a court of law is to obtain a judicial determination enunciating the doctrine that an adequate remedy exists, and will be exercised in equity and by injunction, for the suppression of all illegal traffic in intoxicating liquors *independent of jury and of the jury system.*"

But the court said that there was statutory remedy by criminal process to abate the nuisance, and therefore there could be no jurisdiction in equity, and intimated that even if there were jurisdiction in equity a court of equity would probably exercise its power to submit the questions of fact as to the existence of a nuisance to a jury.[1]

In 1881 and 1885 Kansas enacted statutes known as the "Kansas Injunction Acts" which provided that

> "All places where intoxicating liquors are manufactured, sold, bartered, or given away, or kept for sale, barter, or delivery in

[1] *State* v. *Crawford*, 28 Kansas 726, 741.

> violation of this act are hereby declared to be common nuisances."

The act then provided

First. That such a nuisance might be abated by judgment of court, and destruction by the sheriff of the liquors and other property used in keeping the nuisance.

Second. That the owner or keeper of the place might be *punished upon conviction* by a fine of not less than one hundred nor more than five hundred dollars, and by imprisonment for not less than thirty days nor more than ninety days.

Third. That a suit *in equity* might be maintained in the name of the state to abate the nuisance, in which suit an injunction should be issued *at the commencement of the action* without bond. And that every person violating the injunction

> "shall be punished as for contempt by a fine of not less than one hundred nor more than five hundred dollars, or by imprisonment not less than thirty days nor more than six months, or by both fine and imprisonment in the discretion of the court."[1]

Upon a suit in equity under this law the United States circuit court, to which it was removed, dismissed the bill.[2]

Upon appeal by the state the Supreme Court reversed the decision and held the law valid, saying, that a jury trial was not required in equity cases to abate public nuisances.[3]

And thus by the simple expedient of a statutory declaration that the thing, which the same statute made a crime punishable upon conviction upon a jury trial, *was a nuisance* to be enjoined and punished in equity after conviction by a single judge, *the right of jury trial was absolutely taken away.*

And everybody knew that the law was intended to do this because juries would not convict in such cases.

[1] Kansas Laws, 1881, Ch.
[2] Sec. 13; Kansas Laws, 1885, Ch. Sec.
[3] *Kansas* v. *Ziebold*, 123 U. S. 654.

In 1887 a statute was passed in New Hampshire "to authorize the suppression of common nuisances by courts of equity," which provided that

> "Any building, place, or tenement resorted to for prostitution, lewdness, or illegal gaming, or used for the illegal sale or keeping of spirituous or malted liquors, wine, or cider, is declared to be a common nuisance."

And the act gave the supreme court jurisdiction in equity upon petition by the state or petition of not less than twenty legal voters of the town or city in which the nuisance was alleged to exist, to enjoin the same, and issue an injunction for that purpose.[1]

This statute left the punishment for contempt in violating any injunction issued under it to the discretion of the court, as in other equity cases. It was undoubtedly enacted for the same reason as the Kansas statute, that is, *to punish upon the judgment of the court* in proceedings in equity *that which could not be punished upon the verdict of jurors upon indictment.*

But upon a petition by voters under the act the court held that the statute was not unconstitutional, as taking away a trial by jury, because such a trial was not required in proceedings in equity to abate a public nuisance.[2]

In 1884, the state of Iowa passed a substantially similar act, providing first, for punishment by fine not exceeding one thousand dollars, and second, for an action in equity by any citizen in the county in which the nuisance existed to abate and enjoin the same, and authorizing the court to punish the violation of such an injunction by fine of not less than five hundred or more than one thousand dollars, or by imprisonment for not more than six months, or by fine and imprisonment.

Upon a petition under this act a county court issued an injunction, and punished the violation of it by a fine of five

[1] N. H. Laws, 1887, Ch. 77.
[2] *State* v. *Saunders*, 66 N. H. 39.

hundred dollars and imprisonment for three months. The supreme court of the state sustained the act, and held that this act did not deprive the defendant of jury trial contrary to the constitution, because the proceedings were in equity to abate a public nuisance.[1]

On error, the Supreme Court of the United States sustained the statute, because the proceeding was in equity, in which there was no constitutional right to a jury trial, and said that

> "It seems to be quite as wise to use the processes of the law and the powers of the court to prevent the evil as to punish the offence as a crime after it has been committed."[2]

In 1887, a substantially similar statute was enacted in Massachusetts, to authorize the suppression of common nuisances.[3]

Upon a suit in equity by private persons under this statute the supreme court of that state held that the act did not deprive the defendants of jury trial contrary to the constitution, but this was only by a majority of four judges against the dissent of three, whose views were stated in an elaborate dissenting opinion by Field, C. J.[4]

The constitutionality of these statutes may perhaps be considered as established beyond further question. But if these statutes are valid, it is difficult, as Chief Justice Field said, to see why the legislature cannot authorize a court

> "*to enjoin any person from doing any illegal or criminal act anywhere within the state, and to try without a jury any person so enjoined on a charge of having violated the injunction, and to punish him by fine and imprisonment without limit, if the court find him guilty.*"

It probably would not be claimed, however, that this could be done under the constitution of any state.

[1] 69 Iowa 240.
[2] 124 U. S. 31.
[3] Mass. Laws, 1887, Ch. 380.
[4] *Carleton* v. *Bugg*, 149 Mass. 530, 538.

The evil of these statutes is not that they aided, as they perhaps did, in the suppression of the sale of intoxicating liquors by the extraordinary method of punishment for crime in an equity cause, but that they accustomed the court to the use of equity powers *for public reasons*, and not in the administration of justice between private parties.

I think a review of these cases must satisfy any impartial mind that the courts have unduly extended their equity power to enjoin, and to punish for contempt, and have in fact assumed to govern by injunction.

They have really used their power to adjudicate between private parties, and to protect private rights for the purpose of preserving the public peace and to punish public wrongs.

The only ground upon which these suits in equity by private parties can be sustained is that they are to prevent irreparable injury to private property; *i. e.*, because they state threatened injuries to private property, for which, if committed, there will be no adequate remedy at law. The jurisdiction of an equity court to restrain irreparable injury to private property is undoubted, and has never been questioned.

Neither can it be said that the mere fact that a threatened injury will subject a person committing it to punishment for crime, because the commission of the injury is a crime at common law or by statute, prevents an exercise of the power to enjoin. A man who is about to dig down his neighbor's wall cannot say, "A court cannot enjoin me from digging down the wall, because there is a statute which makes it a crime to dig down the wall." A man who is about to commit irreparable injury of a character which the law makes it a crime to commit, is surely no less subject to injunction than a man who is about to commit an irreparable injury which the law does not make a crime.

Suppose certain acts which would cause irreparable injury are not to-day criminal, and the court enjoins them,

and the legislature to-morrow makes those acts a crime punishable by indictment and fine, or imprisonment, can it be said that the court can no longer enjoin against them?

Nor can it be claimed that the proper exercise of this power violates the constitutional provision securing trial by jury to persons charged with crime.

The power to enforce an injunction order by punishment for violation is *a part of the power to make the order.*

When this power is exercised it is as much an exercise of civil jurisdiction as the issue of the subpœna or the hearing and judgment of the cause. A person bound by an injunction order, either as a party to the suit, or as holding a subordinate relation to a party to the suit, has no right under the constitution to a trial by jury of the question whether he has disobeyed the order. And no such right ought to be given to him by statute.

If the court had no power to make the order, a party who disobeys it can be discharged from any proceedings against him upon *habeas corpus.*

If the court had power to make the order, it has and ought to have full power to enforce it.

To take that power from courts of equity, or to permit it to be exercised only upon trial by jury and ultimate judgment of another court, would practically destroy equity jurisdiction. It is at least questionable whether this can be done as to courts which are established by the constitution, like the supreme court of the United States, the supreme judicial court of Massachusetts, "The Chancellor" of Delaware, and others.[1]

But if the independence and usefulness of the judiciary is to be preserved, the power ought to be so exercised that it will not be taken away in any case.

The courts have gone too far. It is impossible for them to go on in the course they have taken and retain the confidence of the people or preserve their own powers.

[1] Rapalje on Contempts, s. 11. *Arnold* v. *Commonwealth*, 80 Ky. 300.

The courts have said in these cases that "the combination of employés for the purpose of preventing others from being employed, or for the purpose of stopping the business of employers by leaving their employment in a body at a time when others cannot be employed to take their places, inflicts irreparable injury upon the business, *i. e.*, upon the *property* of the employer, and therefore to prevent this irreparable injury to the property of the employer they may enjoin employés from preventing others from being employed or from leaving the service of the employer at a time or in a manner which would endanger or destroy his business, or from refusing, while they remain in the service of the employer, to perform all the duties of their employment."

But where is this to stop? If one man, or a thousand men, either by force, threats, intimidation, or merely by argument and persuasion, prevent others from working for the employer for whom they otherwise would work, and thereby his business is injured or destroyed, the employer has suffered an irreparable injury. If one man, or a thousand men, leave their employment at a time when the business of the employer will thereby be stopped and his property injured beyond repair in damages, the employer suffers an irreparable injury. If one man, or any number of men, in the employ of another, refuse to perform all the duties of their employment, the employer may thereby suffer irreparable injury. If a farmer's hired man quits his service when his crop is partly gathered and will be destroyed by the storm if it is not properly garnered, the farmer may suffer an irreparable injury. If the hired man remains in the service of the farmer and refuses to harvest a particular crop, to cart the hay to the barn before the storm, or cut the corn before the frost, while he is willing to perform all other farm labor, the farmer may suffer an irreparable injury. If a waiter in a restaurant quits the service of his employer just before lunch time, and thereby the employer

cannot serve the lunch which has been prepared, the employer suffers an irreparable injury. And this may be the case whether it is one waiter who leaves or fifty.

The damage caused to the keeper of a small restaurant by the leaving of one waiter may be more serious to him than the damage caused to the keeper of a large restaurant by the leaving of twenty-five waiters. In like manner, the damage caused to the farmer who has but one laborer, by that laborer's leaving when the crop should be harvested, or refusing to harvest crops or any particular crop while he remains, may be as serious and irreparable an injury to the farmer who has but one laborer as similar conduct on the part of fifty laborers may be to a farmer who has fifty laborers upon a large farm. It is only a question of degree. The principle is the same in all these cases.

But can it be claimed that a court of equity should intervene by injunction to command the farmer's man not to leave the service, or, if he remains, to command him to harvest the crop, cart the hay, or cut the corn; or to command a restaurant keeper's waiters not to leave his service, or, if they remain, to serve all customers? Suppose, at the Christmas season, when the proprietor of a large dry goods store or shop has purchased a stock of goods, salable only at that season, and which if not sold will be largely reduced in value, his salesmen or saleswomen are about to quit his service and render it impossible for him to sell his goods, as was said by Judge Ricks, with regard to the laborers on the Lake Shore Railroad: "They are skilled employés, whose places cannot be readily supplied." But would a court of equity interfere by injunction, and command them not to quit the service? Or, suppose they remain in the service, and announce to their employer their intention of not selling a certain line of goods, or of not selling any line of goods to white people, and it appears that the sale of that line of goods, and the sale of all goods to all customers, is essential to the Christmas business, so that, if

they are not then sold, the employer will, practically, lose the value of his goods that ought to be sold, will the court interfere by injunction, and command the salesmen or saleswomen, if they remain in the service, to sell that line of goods, or to sell goods to white people as well as to colored people?

Take another illustration: Suppose, at a season like "Merchants' week," or Christmas, the owner of a large city store has in his employment a thousand persons, skilled in the handling and sale of goods at that season, whose places cannot be readily supplied if they vacate them, and the owners of two or more very large establishments, for the purpose of preventing the owner from selling those goods, and to get the trade themselves, advise all the employés of the owner to quit his service, or, by an offer of higher wages, induce them all to quit that service, whereby the owner of the store is about to suffer irreparable injury, as he undoubtedly would; should a court of equity enjoin those employés from leaving the service of the owner, or enjoin the owners of the other establishments from hiring them, or from advising them to quit?

Or, suppose, instead of advising them to quit, or hiring them to do so, those other employers advise them not to handle a certain important line of goods which the owner of the store has to sell, and do this for the purpose of themselves selling that line of goods which they likewise have to sell. That an irreparable injury to the owner would follow, if this advice were acted upon, is apparent; but would a court of equity enjoin the employés, by a mandatory injunction, to handle this line of goods, or enjoin these other employers from advising them not to do so? Suppose such a combination on the part of the employers to be a criminal conspiracy, would that alone give jurisdiction in equity, which would not otherwise exist?

Where are the courts to stop, if they once set out in this direction? In view of the decision by which the employés

of the Lake Shore Railroad, and of the Northern Pacific Railroad, were enjoined from leaving the service of those roads at a time when traffic would be thereby stopped, and were commanded, if they did remain in the service, to handle interstate freight as well as state freight, what answer could a federal court have to the application of a farmer to restrain his hired man from leaving his employment, when a crop would be lost if he did leave, or to command the hired man, if he remained, to harvest a particular crop, which would be lost if he did not harvest it? Upon what principle could relief be denied the farmer, which had been granted to the railroad company?

Suppose a case in court, where several lawyers have been engaged in its preparation, and are required for its trial by the plaintiff, or the defendant, and one or more of the lawyers is about to quit the preparation of the case, and to refuse to proceed in its trial, the irreparable injury that might arise to their clients in such a case is obvious; but can a court, because it finds that such irreparable injury would ensue, enjoin them, and issue an injunction forbiding the lawyers to leave the service of their clients, or command them, if they remain, to perform a certain portion of the service in the preparation and trial of the case, which they refuse to perform? Benton has lost his reason

Suppose a professional nurse in attendance, or a surgeon or physician in attendance upon a patient is about to leave the service, and no other physician or nurse can be obtained; the irreparable injury that would result to the patient is obvious; but would the court interfere by injunction, and compel the physician or the nurse to remain? And yet, if the ground upon which these injunctions in the railroad cases have been issued is sound, the court ought to interfere in every case of this kind.

Turn it about. Suppose two or more railroad corporations, mining companies, or manufacturing companies, or two or more merchants or farmers, combine and discharge

their employés at a time when they know, and must be assumed to intend, it will deprive them of opportunity to labor, and for the purpose of compelling the employés to come back to work for them at less wages than they could get, but for the combination. Does not this cause irreparable injury to the employés? Is not this a conspiracy and a crime at common law, and also a common law cause of action?

What is the difference between the combination by the employés and the combination by the employers? But would a court of equity interfere and restrain the employers from discharging the employés, whom they were under no contract to retain, or command them to reëmploy them if they had been discharged?

What is the difference between the capacity of the employer to do business, and the capacity of the employé to labor in that business? Is not the one *property* as much as the other? Why should not the parties be left the remedies of the common law in the one case as much as in the other?

The capacity to labor is property as much as houses and lands. It is all the property which the majority of our people have. The right to labor is property which perishes if not enjoyed day by day, and is as much entitled to protection by the courts as the right to buy and sell, or to manufacture, or carry on any business.

The Supreme Court of Massachusetts have treated the right of a person to carry on business as property, and therefore restrained any interference with it which would cause irreparable injury to it.

In *Sherry* v. *Perkins*, 147 Mass. 212, they thus protected the business of a shoe manufacturer, and in *Vegelhan* v. *Guntner*, 167 Mass. 92, they protected a manufacturer of furniture.

But when they were asked to protect laborers from an interference with their right to labor upon the ground that

that capacity to labor and right to labor is property, they declined to do so.

In *Worthington* v. *Waring*, 157 Mass. 421 (December, 1892), laborers who had been employed in a mill in Fall River, and had left because they could not obtain higher wages, brought a bill against the treasurer and superintendent of the corporation, the employment of which they had left, and officers of other mills, charging that these officers had conspired together, and put the names of the plaintiffs upon a "black list," stating that the petitioners had been engaged in a strike, and had induced all employers of their kind of labor in Fall River to refuse to employ them

> "*with intent to compel them either to go without work in Fall River, or to go back to work for the corporation, the employment of which they had left, at such wages as that corporation should see fit to pay them,*"

and asked that the defendants be restrained

> "from annoying the petitioners and interfering with their rights to earn their livelihood at their trade in Fall River, and to withdraw and destroy all black lists or other devices used by the defendants, or under their orders for that purpose."

To this the court said that if the petition charged a conspiracy which was a misdemeanor at common law, the remedy was by indictment, and if the injury caused to the petitioners by the conduct of the defendants constituted a cause of action, the remedy was "by an action of tort to be brought by each petitioner separately." The court then said that while

> "courts of equity often protect property from threatened injury when the rights of property are equitable, or when, although the rights are legal, the civil and criminal remedies at common law are not adequate, but the rights which the petitioners allege the defendants were violating, at the

time the petition was filed, *are personal rights, as distinguished from the rights of property,*"

and therefore the court declined to entertain the petition.

Is it any wonder that laboring men say that:

> "Laws grind the poor,
> And rich men rule the law"?

In the Ann Arbor and Northern Pacific cases the court said that the power of a railroad company to transport freight and passengers was property, and therefore any combination of employés to cripple and destroy that power of transportation was an interference with property which the court could enjoin in equity. Why is not the power of the employés to labor property as much as the power of the railroad company to transport? Why should one be protected and not the other? In the Northern Pacific and Ann Arbor cases the court said that it would restrain employés of railroad companies from quitting the service of the companies with intent to prevent the companies from carrying on their business. Turn it about: suppose those railroad companies had been about to discharge all their employés at a time when they could not get employment elsewhere, and for the purpose of injuring them by compelling them to work for less wages than they ought? Would not this have been an irreparable injury to the capacity of the employés to labor, that is to say, to their property, as much as a combination by the employés to quit service for the purpose of compelling the companies to pay more wages than they should? If the courts can interfere in the one case, why not in the other?

But ought they to interfere in either case? Is the exercise of equity power to enjoin and to punish violation of injunctions by process for contempt a proper remedy in such cases? I think not, except as it can be exercised against persons named, and to prevent or command specific acts.

"A writ of injunction is a judicial process operating *in personam*, and requiring *the person to whom it is directed to do* or refrain from doing a *particular thing*."[1]

An injunction may be the final judgment, or it may be interlocutory, but in either case it is a matter purely personal to the party against whom it is directed, and persons occupying a subordinate relation to that party. Neither the judgment ordering the injunction, nor the injunction, partakes of the nature or character of a proclamation.[2]

It is impossible to conceive of one of the great chancellors, whose wise and conservative decisions established the equity jurisdiction which is so essential to the complex affairs of modern life, issuing an injunction to "all persons whomsoever." And no amount of legal sophistry can satisfy the average mind that such an injunction is anything but a judicial riot act, an equity proclamation to keep the peace, an abuse of judicial power.

Underlying this whole matter is the question whether a combination by two or more persons to do that which each has the right to do alone, is criminal or actionable.

It has been held that it is, because by the combination an injury can be done which cannot be done by the individual. But in many cases this is not so. A single skilled employé in charge of some delicate machine necessary to the operation of a mill or a mine, may, by leaving his employment, stop the entire work, and do more harm to the business of the employer than can be done by a combination to quit by a hundred unskilled employés.

There are countless cases in the complicated conditions of modern life when the power of one is infinitely greater than the combined power of many.

In the Northern Pacific case it was said that each and every employé had a right to quit, even if he intended thereby to cripple the business of the company, but that if he acted in concert, in *combination* with one or more of

[1] High on Injunctions.
[2] *Boyd* v. *State*, 19 Neb. 128, 132.

his fellows for the same purpose, his conduct would be unlawful.

But suppose all the employés had been hired to work for one, and he was operating the road by the day, and that he alone, having the right to command the service of them all, had ordered them to quit and work elsewhere, or not to work at all, for the purpose of crippling the business of the company, there would have been no combination, and yet the resultant injury would have been the same.

A single mill owner may lawfully discharge all his laborers for the purpose of depriving them of work and injuring them, and it is lawful. But if he combines with another mill owner to do both, or the same thing for the same purpose, it is unlawful. And yet if one buys the mill of the other, or they combine with others and form a corporation to own and work the mills, it is lawful.

If all the employés of a railroad form a corporation to do the work of railroading, and *it* is operating a railroad, *it* may stop operation for the purpose of injuring the railroad company and it is lawful because *it* only does what it has a right to do, and there is no combination. It is not an answer to say that a corporation is itself a combination of natural persons, for it is a lawful combination.

Two natural or artificial persons agree together to do something which they each have a right to do, and it is unlawful because it is said the agreement to do it *together* gives them a power they would not have acting alone.

But the one buys out the other, or consolidates with it, or they both sell to another, and thus by continued unity and certainty of action the power to do harm is vastly increased, and yet the thing which each of the old corporations could not lawfully do, the new corporation can lawfully do.

But suppose these combinations are actionable and criminal, why should courts of equity interfere to restrain or punish them?

The constantly widening competition of civilized life continually forces combination to control or suppress it. Combinations of capital and combinations of labor face each other on every field of industrial effort. The arbitrary power of the corporation and the trust are met by the tyranny of the trade union and the despotism of the walking delegate. The courts can no more prevent or restrain these combinations by orders of injunction and proceedings for contempt than they can stay the tides or the stars in their courses. So long as they produce no results which the legislature does not condemn by statute, and juries do not condemn by their verdicts, they should be let alone. Any evil which results from them can be better remedied by the legislature and by verdicts of juries than by the fallible discretion of single judges in the exercise of so-called equity powers, however honest and wise the judges may be.

It is idle to say that the popular complaint on this subject means nothing, or that, as one judge has said: "Nobody objects to government by injunction except those who object to any government at all."

It does mean much. It means that the courts have, in the judgment of many of the most intelligent and thoughtful citizens and of congress, exceeded their just powers; that they have by the so-called exercise of equity power practically assumed to create and to punish offences upon trial by themselves without a jury, and with penalties imposed at their discretion. And this means that if the courts continue in this course, their power to enforce their orders by proceedings for contempt will be limited by legislation. The people will not, and they ought not to, submit to decisions like those in the Northern Pacific and Ann Arbor cases. The result will be to deprive the courts of the power to enforce orders which they ought to have power to enforce, and the mischief that will come can hardly be estimated.

The remedy is not by legislation. The subject is not

one for partisan debate, and should not enter into politics in any degree whatever. Thoughtful, intelligent, conservative discussion by the profession will remedy the evil, and to that discussion all members of the bar who have the good of the republic at heart ought to bring their best effort.

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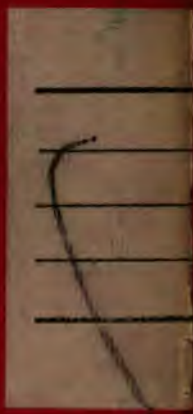
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